S. HRG. 103-703

EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

HEARING

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 2238

TO PROHIBIT EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

JULY 29, 1994

Printed for the use of the Committee on Labor and Human Resources

U.S. GOVERNMENT PRINTING OFFICE

82-696 CC WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-044874-3

S. HRG. 103–703

EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

HEARING

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 2238

TO PROHIBIT EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

JULY 29, 1994

Printed for the use of the Committee on Labor and Human Resources

U.S. GOVERNMENT PRINTING OFFICE

82-696 CC WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-044874-3

COMMITTEE ON LABOR AND HUMAN RESOURCES

EDWARD M. KENNEDY, Massachusetts, *Chairman*

CLAIBORNE PELL, Rhode Island
HOWARD M. METZENBAUM, Ohio
CHRISTOPHER J. DODD, Connecticut
PAUL SIMON, Illinois
TOM HARKIN, Iowa
BARBARA A. MIKULSKI, Maryland
JEFF BINGAMAN, New Mexico
PAUL D. WELLSTONE, Minnesota
HARRIS WOFFORD, Pennsylvania

NANCY LANDON KASSEBAUM, Kansas
JAMES M. JEFFORDS, Vermont
DAN COATS, Indiana
JUDD GREGG, New Hampshire
STROM THURMOND, South Carolina
ORRIN G. HATCH, Utah
DAVE DURENBERGER, Minnesota

NICK LITTLEFIELD, *Staff Director and Chief Counsel*
SUSAN K. HATTAN, *Minority Staff Director*

CONTENTS

STATEMENTS

FRIDAY, JULY 29, 1994

ADDITIONAL MATERIAL

EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

FRIDAY, JULY 29, 1994

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:31 a.m., in room SD–430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Metzenbaum, Simon, Wellstone, and Kassebaum.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. The committee will come to order.

From the beginning, civil rights has been the great unfinished business of America, and it still is. In the past 40 years, the Nation has made significant progress in removing the burden of bigotry from our land. We have had an ongoing and peaceful revolution of change, and that accomplishment is a tribute to our democracy and to the remarkable resilience of the Nation's founding principles.

Federal law now rightly prohibits job discrimination because of race, gender, religion, national origin, age, and disability. Establishing these essential protections was not easy or quick. But they have stood the test of time, and they have made us a better and a stronger Nation.

We now seek to take the next step on this journey of justice by banning discrimination based on sexual orientation. At the press conference introducing this legislation, Coretta Scott King said: "I support the Employment Non-Discrimination Act of 1994 because I believe that freedom and justice cannot be parcelled out in pieces to suit political convenience. As my husband Martin Luther King, Jr., said, injustice anywhere is a threat to justice everywhere."

This point was reemphasized today by other civil rights leaders who have contributed so much to our Nation. The legislation directly parallels protection against job discrimination in current law, under Title VII of the Civil Rights Act of 1964.

Our bill prohibits the use of individual sexual orientation as the basis of hiring, firing, promotion or compensation. This kind of prohibition on discrimination is well-established in law, and it can be easily applied to sexual orientation.

The bill has been realistically designed in an effort to avoid needless controversy and keeping our eye on the goal, which is to elimi-

nate job discrimination against any Americans because of their sexual orientation.

This bill is not about granting special rights. It is about righting senseless wrongs. What it requires is simple justice for gay men and lesbians who deserve to be judged in the workplace like all other Americans by their ability to do the work.

The bill is narrowly drafted in five key respects. First, no claims would be permitted based on under-representation of gay people in the work force. Second, the legislation makes clear that preferential treatment, including any quota, is prohibited. Third, the religious exemption is broadly applied. Fourth, benefits for domestic partners are not required. Fifth, the Act does not apply to members of the armed forces; that issue is now settled, at least for the Congress, and we do not seek to reopen it.

Today, job discrimination on the basis of sexual orientation is too often a fact of life. Throughout the country, qualified employees live in fear of losing their livelihood for reasons that have nothing to do with their job skills or their job performance. Yet there is no Federal prohibition on such discrimination.

This bill is about real Americans whose lives are being shattered and whose potential is being wasted. Today we will hear directly from two such individuals, fellow Americans, who performed well, but for whom merit did not matter.

Some States have already outlawed such discrimination, but in 42 other States, qualified lesbians and gay men with excellent records can be fired without warning just for being gay. It happens every day. And the price of this prejudice, in both human and economic terms, is unacceptable.

Job discrimination is not only un-American; it is counterproductive. It excludes qualified individuals, lowers work force productivity, and hurts us all. For our Nation to compete effectively in a global economy, we have to use all available talent and create a workplace environment where everyone can excel.

This view is shared by many leaders in both labor and management who understand that ending discrimination based on sexual orientation is good for workers, good for business, and good for the country.

Our legislation is bipartisan; it is sponsored now by 30 Senators and 125 members of the House of Representatives, and I am confident the number will grow. We have the support of a broad-based coalition that includes Coretta Scott King and former Senator Barry Goldwater, the conscience of civil rights and the conscience of conservatives.

Today's hearing brings us closer to the ideals of liberty and equal opportunity. I look forward to the testimony of our witnesses and to working with my colleagues on the committee and in the Congress to enact this needed measure.

It is important that we remember as we debate the merits of the Employment Non-Discrimination Act of 1994 that what we are talking about is people's lives and livelihoods, men and women struggling to find the security that so many of us take for granted.

Senator Pell could not be here this morning. He is on his way to New York City to participate in proceedings at the United nations in connection with the signing of the Law of the Sea Treaty.

He regrets not being able to attend the hearing this morning and asked that his statement be included in the record and that along with Senator Bingaman also.

[The prepared statements of Senators Pell and Bingaman follow:]

PREPARED STATEMENT OF SENATOR PELL

Thank you Mr. Chairman, and thank you for holding this hearing. let me begin by welcoming all our witnesses to the committee this morning.

In one way, Mr. Chairman, it is unfortunate that we are here this morning. It is unfortunate that in 1994 this Nation is still debating the issue of discrimination. Didn't we learn anything from the Civil Rights movement of the 1960's? Haven't we learned not to judge others based on who they are or what they are?

Unfortunately, there are still too many of our fellow citizens who go to work every day in fear of losing their jobs for reasons having nothing to do with their job performance. Maybe we need to turn to some of this Nation's Fortune 500 corporations for guidance. AT&T, Marriott, and General Motors all have amended their employment policies to prohibit discrimination based on sexual orientation because they realize that getting the job done has nothing to do with the race, religion, gender, or sexual orientation of the individual.

Mr. Chairman, I am a cosponsor of this bill and I am therefore anxious to have this bill approved by the committee and by the full Senate. Some of my colleagues, however, have yet to make a decision on the bill. I urge them to support the legislation because it is the right thing to do.

Maybe we should take advice offered during a previous Senate committee hearing, advice that has become very famous. In testimony before the Senate Armed Services Committee in 1952, Charles E. Wilson made the following statement, "For years I thought what was good for our country was good for General Motors, and vice versa."

If a prohibition on employment discrimination based on sexual orientation is good enough for General Motors, it's good enough for our country. Thank you Mr. Chairman.

PREPARED STATEMENT OF SENATOR BINGAMAN

Mr. Chairman, I wish to address the importance of the Equal Employment Opportunity Act of 1994. The desired outcome of this proposed legislation is straightforward. Americans shall not face discrimination in the workplace based on their sexual orientation. This equal right extends the protection from discrimination based on race, religion, gender, and national origin as stated under Title VII of the Civil Rights Act of 1964, and disability, stated under the Americans with Disabilities Act.

In the past, we have tried with little success to establish laws that protect Americans from job discrimination based on their sexual orientation. In turn, the American people have been sending their message approving protection from discrimination in the workplace for all Americans. According to an editorial column in the Philadelphia Inquirer, dated July 3, 1994, a recent poll indi-

cated that three out of four Americans supported laws to protect individuals against job discrimination based on sexual orientation.

The existing problem is that Americans are being discriminated against based on their actual or perceived sexual identity. Individuals are being discharged of their livelihoods and being denied promotions in their workplace. It is unlawful for an employer to deny an applicant an employment opportunity based on race or disability. I strongly believe that no one should be denied employment for reasons unrelated to their fitness for the job.

It is time for Congress to make a clear statement in America that Americans should not be discriminated against based on our identities. The Equal Employment Opportunity Act of 1994 makes that point. This act provides that everyone shall receive equal protection under the law. It does not grant special rights, nor does it deny equal rights.

The status of one's employment should be based solely on the ability of an individual to perform to the standards of his or her employer. Therefore, i urge my colleagues to commit themselves to support this legislation that protects all Americans from bias and discrimination in the workplace.

The CHAIRMAN. We are grateful to be able to hear this morning from two courageous individuals who have felt the direct impact of anti-gay prejudice. They have been kind enough to come here and share their stories with us and to represent all those who cannot afford to speak out. Unfortunately, their pain is all too common.

I believe you both have valuable insights that we cannot get anywhere else. We are very pleased that you could be here, and I want to say at the outset that I know that this is not easy, and we appreciate your perseverance.

The first witness is Cheryl Summerville, from Bremen, GA. Cheryl worked as a cook for a national restaurant chain for 4 years and received excellent job performance reviews, awards, and regular raises. She got along well with her managers and coworkers and was quite content, until 1 day, she was fired for being gay, plain and simple. No one tried to hide that fact; it was the new company policy.

We are also joined this morning by Ernest Dillon, an employee of the Post Office in Detroit, MI. Ernest, too, was a good worker and a loyal employee, but a coworker decided he was gay and was determined to run him out. Ernest was forced to withstand unyielding harassment until he could take it no longer. Unfortunately, his employer could not help him, and he almost paid the price with his life.

Cheryl, would you begin, please? We thank you very much for being here.

STATEMENTS OF CHERYL SUMMERVILLE, BREMEN, GA; AND ERNEST DILLON, DETROIT, MI

Ms. SUMMERVILLE. Thank you.

Good morning, Senator Kennedy and members of the committee, and thank you for giving me the chance to be here.

My name is Cheryl Summerville, and I am from a small town in rural west Georgia called Bremen. I sure never thought I would testify before Congress, and certainly not on this issue.

I am kind of a private person, and this is not easy for me.

The CHAIRMAN. I will say to you, Cheryl, that you can just relax. You know, we have a lot of hearings, and we hear from a lot of people, because this committee deals with a lot of people's needs. In here a little while ago, we had some children who testified, most recently, about health care. And the people we have heard from never thought they would testify before Congress.

I think all of us understand that the laws we pass or try to pass affect real people's lives, and I think your willingness to share your experience is enormously important to help people understand what this whole sort of stain on the conscience of this country is about. It is about not treating people with respect for who they are rather than for some other kind of test, which I think demeans the country. Certainly, it demeans those individuals who treat people unfairly and who discriminate.

And we know it is difficult for people to talk about things which are most personal. People for example, do not like to talk about the fact that they are sick, or that they have spent all their resources, or about other members of their family. So we know this is not easy for you.

But around here, you know, we talk too often in slogans and in cliches. What is important is that this body, the Senate, our committee, and the American people understand what really happens out there, what the real world is all about. And when we do, I think people are fair and want us to be a fair country.

I think you have been treated very wrongly, and I think many other people think so, too, so we just want you to tell your story. We know it is difficult, but we appreciate that you are willing to do that with us, and we hope you can feel comfortable in doing it. You are among friends here.

Ms. SUMMERVILLE. Thank you.

I am kind of a private person, and this is not easy for me. But it is important to me, and that is why I am here.

In 1987, I took a job as a cook at the Cracker Barrel Old Country Store in the town of Douglasville, GA. I worked hard, and my coworkers and managers really liked working with me. And they told me so. I put in a full day's work, often leaving my house at 5 in the morning and not returning until 7 at night.

I worked there for almost 4 years and always had excellent performance evaluations. I got awards and promotions. I enjoyed my job at Cracker Barrel, and I thought I had a real bright future ahead of me. [Pause.]

The CHAIRMAN. Cheryl, we could hear from Mr. Dillon, if you like.

Ms. SUMMERVILLE. I do not think it is going to get any easier.

The CHAIRMAN. I think you have said a lot already. Would you like to just tell us in your own words, or would you like to read it? You can do it either way; you are doing fine. You really are.

Ms. SUMMERVILLE. Thank you.

The CHAIRMAN. I think we all have a lot of respect for you and your willingness to testify. You worked there for a little over 4 years, and you had done a good job and had good reviews.

Ms. SUMMERVILLE. Yes. One day in January of 1991, that all came to an end. The chairman of Cracker Barrel, the Corporation,

had a memo sent around directing managers to fire all employees "whose sexual preferences fail to demonstrate normal heterosexual values." When I heard it, I could not believe it. What would happen to me? What would happen to my family?

I was scared. I was more than scared—I was panicked. Not because I am a lesbian, but because I relied on my job. I had responsibilities and commitments, and I take that very seriously.

I had just bought a home, after saving for yes, and had a mortgage to carry. My son was in high school and had dreams all his own. He was depending on me. I could not afford to lose my job.

You have to understand, although I keep my private life private, it was not a deep dark secret to the people I worked with. I have never hidden who I am. I had gotten close to a couple of my managers, and they knew I was gay. But it did not matter. I got my orders out, I was a good cook, and I was a reliable worker. Besides, my life was a normal and regular as anyone I knew. I went to work, I walked my dogs, and I loved my family.

I first learned about the policy from my sister and my sister-in-law, both of whom also worked for Cracker Barrel at the time. They had been read the new policy, and they called to alert me. They could not believe that it would actually happen to me; after all, everyone liked and appreciated me.

The next morning when I went to work, I went in to talk to my manager, and she read me the new policy. She said she really liked me, she said that I was a great employee, and that she hated to have to let me go. But she called her boss, and he called his boss, the district manager, who told them to follow company policy. The corporate folks said the policy applied to everyone who was gay. There were no exceptions for good workers.

So after nearly 4 years of committed service with Cracker Barrel, including raises and personal achievement awards, I was fired for being a lesbian—something that has nothing to do with my ability to do my job and do it well.

On my separation notice, they wrote, "This employee is being terminated due to violation of company policy. This employees is gay."

Deep in my heart, I knew it was wrong, and I could not believe it could possibly be legal. I believe that in America, with such obvious discrimination, we figured we could go to court and fix things. We were wrong.

If I lived in Massachusetts or Minnesota, the State law would have protected me against being fired for being gay. But not in Georgia. What Cracker Barrel did was perfectly legal under the laws of Georgia, and most States. There was nothing I could do about it.

But I still figured that the Federal law would protect me, even if the State law did not. After all, our country had taken a stand on civil rights, and that is what made us Americans. But Federal law did not cover me, either.

Senators, what happened to me is not fair, and it is not right. I worked hard at my job, and my reward was getting fired for no good reason. It should not matter who you are or where you live. Discrimination is wrong, and it should not be legal against anyone—anywhere.

This experience has been a real eye-opener for me. Maybe it is because I grew up in a small town, or maybe it is because I trusted people too much. I thought I knew what family values were, and that I practiced them every day of my life. I had no idea that this could happen, until it happened to me.

I never realized there was so much prejudice out there. I have never done anything to hurt anyone, but since people heard about my story, I have received harassing and obscene phone calls. I had to take my son out of his high school because the school could not assure his safety.

All of this, because I wanted a little piece of the American dream—a loving family, a decent home, and a good job—just like everyone else.

Senators, the right to hold a job should not be based on whether someone is black or white, male or female, gay or straight. It should be based on ability and dedication. That is just what I grew up believing. Is that asking for too much? I do not think so. And I do not think most Americans think so.

I hope that you will take action to ensure that people like me—a fellow American—can have the same rights as everybody else.

Thank you.

The CHAIRMAN. Thank you, Cheryl. I know that was probably one of the most difficult moments of your life in many respects, sharing this with us, but I want you to know that in your testimony, I think you have said it all, and we are grateful to you. You have provided a real service to us.

Ms. SUMMERVILLE. Thank you.

The CHAIRMAN. We are very proud of you and very proud of your son.

Ms. SUMMERVILLE. Me, too.

The CHAIRMAN. You make sure you give him our best regards. Senator Metzenbaum.

Senator METZENBAUM. Ms. Summerville, it was very difficult for you to testify, but it was very important. I think there are many of us in Congress—I am not sure if there is a majority—who feel as strongly as this Senator does, that any kind of discrimination is just wrong.

As you were sitting there testifying, I remember that 51 years ago, I introduced legislation in the legislature to ban discrimination based upon race, color, creed, or national origin. At that time, that was a horrendous idea, and I was smeared as a Communist for coming out with such legislation.

But you have made a powerful statement that no one of us could not empathize with and identify with. You are a good American. You are obviously a wonderful mother. As the father of daughters of my own and a grandfather, I just cry out for you and your son, who had to be withdrawn from his school because they could not assure him of his security.

I do not know if we can pass this legislation, but I know I am going to try damn hard to work with the chairman, whose bill it primarily is, to pass it even in the closing days of this session. It is wrong, it is evil, it is un-American to discriminate against people by reason of their sexual preference.

And the chairman of the board of Cracker Barrel ought to hang his head in same for enunciating such a policy. I respect your right, and I think I have an obligation to you to do everything possible to defend your right with respect to the matter of sexual preference and to see to it that no individual in this country is discriminated against for the wrong reasons, and this is one of the wrong reasons.

Ms. SUMMERVILLE. Thank you.

Senator WELLSTONE. Mr. Chairman, could I just add a word?

The CHAIRMAN. Yes.

Senator WELLSTONE. I will be very brief. Your words, Ms. Summerville—and I will essentially repeat what you have heard. I am really proud to be here with these colleagues, and your words are very powerful, and I am very proud to be an original cosponsor of this piece of legislation introduced by Senator Kennedy. And your words make me even more proud.

I would thank you for being here.

Ms. SUMMERVILLE. Thank you.

The CHAIRMAN. Senator Simon.

Senator SIMON. I would just concur, and I thank you. It took courage for you to be here. One of my town meetings Saturday was in Effingham, IL, where a woman came up to me afterward and asked, "Your father was a Lutheran minister; how can you side with homosexuals and gays?"

I do not know what people expect—do they expect you just to disappear from the face of the earth? People ought to be judged by their conduct, not their genes. That is true whether it is race or ethnic background or sexual preference or whatever it is.

I can tell you this—I am not going into Cracker Barrel again until there is a change in policy on the part of Cracker Barrel. This is not right. You have not been treated fairly.

We clearly ought to change the law so that people are protected. Discrimination, whatever its reason, is wrong, period. And whenever we do not live up to that, we hurt this country.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Mr. Dillon.

Mr. DILLON. Good morning, Senators, and thank you very much for inviting me to testify for such a cause I believe so strongly in.

Before I start my testimony, there was a disturbance in the hallway and in the room there, in the back, that made me very sad. There were black men who were practically just barging in, or forcing their way into the hearing room. I do not really know what it was all about, but it reminded me of the civil rights movement in 1964, when we were trying to enact the Civil Rights Act of 1964; there were people who were doing the same thing then, and it is very sad to see that sort of thing happen in a building such as this, where there is a certain type of protocol.

The CHAIRMAN. I am not familiar with it. The hearing room now is at full capacity, and there are probably people outside, but I do not know of people trying to keep people out.

Mr. DILLON. No, Senator. These people came in through the back, and they were just trying to force their way in. They came in through the back room there.

The CHAIRMAN. Oh, I see. I will try to get a report. I am not familiar with what happened. But generally, the public comes through those doors, and staff come through the committee room. In any event, I will be glad to look into it after the hearing.

Mr. DILLON. My name is Ernest Dillon. I am honored to be here this morning and to be given the opportunity to tell my story.

I wish I did not have a story to tell, but I do. A story of harassment on the job, of violence that nearly cost me my life, and of discrimination that forced me from my workplace and robbed me of my livelihood.

I began working for the postal service in Detroit in 1980. It was a good job, a job I was extremely grateful to have. I worked well with my coworkers. We were a team, and our teamwork made for a very effective workplace.

My first 4 years with the post office passed quickly, and I received regular raises. Then, in 1984, things changed. A coworker, suspecting I was gay, began to make anti-gay remarks to me. I had known him for a while, and I could not understand where his new attitude was coming from. I was the same person I had always been—quiet and hardworking, never bothering other people. Whether I was gay or not was not anybody's business, and it certainly did not have anything to do with my job. I did my job, and I did it well.

But the insults soon escalated into more serious harassment. They happened every day. They just would not quit. To earn a living, I had to endure constant verbal abuse, and try to keep focused while finding outrageous things written about me, plastered on the walls of the office and in the trucks—nasty things, vulgar things, hurtful and hostile things.

I reported these incidents to my supervisors and to my union representative. My supervisors said there was nothing they could do to help me until my harasser actually "did something." Somehow, these degrading experiences were not enough—he had to do something more; he had to do something violent.

My union representative urged me to start keeping notes of the incidents, and I did that.

This torment had broken the spirit of the office and compromised our productivity. The harassment and hatred kept us from working as a team. It was not fair to me, and it was not fair to my coworkers.

The hostility was becoming so intense, I frequently considered leaving the job. But after a lot of thought, I decided to stay. I am a black man from Detroit, and I have seen much bigotry before. I had been taught at a young age that you do not run from prejudice. You persist in the face of it. You work hard, you persevere, and eventually it pays off. More than anything else, I had been taught to believe that in America, if you do your job well, you have the right to keep it.

Then, 1 day while on the job, my coworker cornered me, and I thought he would kill me. He threw me down on the floor, kicked me, and beat me until I was unconscious. He left me in a pool of blood, with two black eyes, a severely bruised sternum, and gashes in my forehead. When I regained consciousness, a supervisor rushed me to the medical unit and then to the emergency room. I

was sewn up, received medication, and spent 3 weeks recovering from my injuries.

When I finally returned to work, I was pleased to be working again, but scared to death. Although the coworker who had beaten me was fired, any relief I felt was very brief. All of a sudden, others were now willing to pick up where he left off. They too began leaving anti-gay messages at my work station and making anti-gay slurs, both to my face and throughout the office.

I continued to notify my supervisors of these events. They would not intervene, claiming they could do nothing to stop or prevent such abuse. I tried to just keep doing my job, and I tried not to think about it.

But this harassment continued for 3 years, and it kept chipping away and chipping away at my spirit and my soul. Then, 1 day, I received a death threat from one of my harassers. Fearing another violent incident, I spoke to the staff nurse, who told me to go home for the day. I called a therapist, who advised me to get help, including filing a workers' compensation bid and an equal employment opportunity, or EEO, claim.

Soon afterwards, I filed an EEO claim, thinking that something could be done to fix my work situation. I could not believe that people were allowed to torment you on the job and get away with it. I was still getting my work done, but the work environment had gotten so dangerous that I feared for my life and for my self-esteem.

The discrimination was so intense, it had forced me from my job. It just was not fair.

The administrative panel that heard my case believed that I had been wronged, but the appeals began. Eventually, my claim wound its way into the 6th Circuit Court of Appeals, who said the law of the United States just did not protect me.

The judge said: "Dillon's coworkers deprived him of a proper work environment because they believed him to be homosexual. Their comments, graffiti, and assaults were all directed at demeaning him solely because they disapproved vehemently of his alleged homosexuality. These actions, although cruel, are not made illegal by Title VII."

I turned to my union, my supervisors, my doctor, and the court—only to find that in America, I am not entitled to be able to work without fearing for my life. Well, that is just wrong. That is now how I was raised. That is not what I was taught to believe in. Something has to be done, and soon.

I have now gone back to work for the post office, but at a different branch. Luckily, I have not had to endure harassment or discrimination, but without extending Federal law to cover sexual orientation, my job, my livelihood and my safety are only a matter of luck.

Please help me and the thousands of Americans who experience discrimination. I want what every other American wants—the ability to work, to be treated fairly, to be judged by who I am, and to be free from discrimination and harassment.

I look to Congress for leadership in stopping the pain and prejudice, and in passing a Federal law to protect me.

Thank you.

The CHAIRMAN. Thank you very much, both of you. I just have a very brief observation about that opinion that was issued on your case, Mr. Dillon. In that opinion, it points out, "Dillon's coworkers deprived him of a proper work environment because they believed him to be homosexual. Their comments, graffiti, and assaults were all directed at demeaning him solely because they disapproved vehemently of his alleged homosexuality. These actions, although cruel, are not made illegal by Title VII."

In other words, you are on your own, you are on your own. There are no Federal protections here from this kind of discrimination which this Nation has battled to achieve over a long, long period of time for others. But this court indicated there are no protections based on sexual orientation, which is the reason why we are here today to support legislation to make sure that there are such protections.

Senator Metzenbaum.

Senator METZENBAUM. Just briefly. Mr. Dillon, it takes courage to come before this committee and talk to the world about the problems that you have experienced. I just want you to know that I am very grateful to you and to Ms. Summerville.

It is immoral what is happening to those persons who are gay or lesbian, and I think we have a responsibility to do something about it. I will not be here in the Senate very long, but I hope that before I leave it, I will be a party to making a change so that discriminating against people who are gay or lesbian is just as illegal as discriminating against people on the basis of race, creed, national origin, or other bases.

The CHAIRMAN. Senator Simon?

Senator SIMON. Just a note. It is ironic, as you mentioned before you began your prepared statement, Mr. Dillon, that there are those who, when one form of discrimination has been outlawed, will not join in fighting other forms of discrimination. We should. God has not made us all the same. We have to give everyone a chance.

Something is fundamentally wrong when you have to go through what you have gone through. And that does not mean if we pass a law saying you cannot discriminate that everything is going to be right the next day, any more than it is right for African Americans today. But it has improved for African Americans. Not for all, unfortunately; particularly for the poorest of African Americans, we have not faced up to the problems of poverty. But you no longer travel in the South and see signs that say "Colored" and "White." We have made progress, and one of these days, we are going to make progress in this area, also, and recognize that we have to judge people on something other than how God made them.

We thank both of you for your testimony.

The CHAIRMAN. Senator Wellstone.

Senator WELLSTONE. Just three quick comments. First of all, Ms. Summerville, I believe you mentioned my State of Minnesota in your testimony, or you talked about States that provided protection. I just want to say how proud I am of my State for passing the human rights bill and law in 1992. I think leadership is inspiring people to be their own best selves, not appealing to the fears of people. And that leadership emerged in Minnesota, and a lot of people did not think we could pass that initiative. I was proud to

be a part of that effort, but there were a lot of legislators who stepped forward, as they began to educate themselves and listen to the kind of powerful words that you all have uttered, who just finally decided that leadership is calling on people to be their own best selves, including us. And we passed that law, and I look forward to our doing that here in the Congress.

My second point is that Sheila and I have a very close friend, and we have shared his struggle for the last 30 years. And I feel like you all speak for him. I have seen this man have to go from one job to another because every time it becomes clear and somebody discovers that he is gay, he lives in terror. It just does not make sense for people to have to live that kind of life in our country. That is not what our country is about.

So I do not know that he still could come and speak here today as you have, but you represent him, and I just want to let you know—I have seen his pain. I have seen the terror of this kind of discrimination. I have seen what it has done to him. And I thank you so much.

Finally, Mr. Dillon, I look forward to the day in the United States of America, to quote a very, very great leader in our country, where we truly do judge people by the content of their character—where we truly do judge people by the content of their character. That is what this legislation is about.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kassebaum.

Senator KASSEBAUM. Mr. Chairman, I apologize for being late. I was in a health care meeting, and I apologize for missing the testimony. I have been looking through it and will continue to look through it.

I certainly would agree with the Senator from Minnesota when he says he hopes we will reach the day when it is the content of the character that is the basis for judgement. It certainly should be.

As the chairman knows, and others, perhaps, I have always questioned just how much we can do by law to end intolerance, to help us reach that point where we judge by character and not on other factors that should not be used in judging the ability of one to do his job and his work and take his place in society.

But that is what this hearing is about; how do we and how should we address this issue. I very much appreciate the strength that you have shown to come and testify this morning.

Thank you.

The CHAIRMAN. Ms. Summerville, just before you leave, let me ask you if you have a job now, and how you support yourself and your son?

Ms. SUMMERVILLE. By doing a little bit of everything. I deliver newspapers; in the winter time, I sell firewood; I have painted houses. I will do anything to feed my family and keep a roof over our heads.

The CHAIRMAN. So you are making a go of it now.

Ms. SUMMERVILLE. Yes. It is not easy.

The CHAIRMAN. Good. Well, thank you. It is a very important story that you have shared with us here today, and please let us know if we can be helpful.

We want to thank this panel very, very much, and we hope you can stay for the remainder of the hearing.

Thank you.

Ms. SUMMERVILLE. Thank you.

Mr. DILLON. Thank you.

The CHAIRMAN. Our second panel includes Justin Dart, the former chairman of President Bush's Committee on Employment of People with Disabilities. President Bush referred to him as one of the strongest advocates for equal rights and equal opportunities for all Americans, and I could not agree more. I was proud to work with Justin, and other members of this committee, on the enactment of the ADA 4 years ago this week, and we are honored that he has once again joined us in the pursuit of full freedom for all Americans.

Warren Phillips will give us the business perspective. Mr. Phillips was the CEO and chairman of the Board at Dow Jones and Company for more than a decade, and was also the manager editor and publisher of The Wall Street Journal. Currently, Mr. Phillips is on the board of trustees of Columbia University and PBS, and he runs a publishing company. He has a wealth of experience, and we are extremely grateful that he is able to join us this morning.

We will also hear from Steve Coulter, vice president of Pacific Bell, a company with thousands of employees, serving millions of residents of California. Mr. Coulter is here to bring us his company's endorsement of this Act and to share with us their corporate philosophy. PacBell has had a nondiscrimination policy which includes sexual orientation in place for more than a decade. Mr. Coulter, we are glad to have you.

Finally, we welcome Richard Womack, who is director of civil rights at the AFL-CIO, the labor movement, and the AFL in particular, and has been on the front lines of the struggle for equal opportunity. Since the very beginning, the AFL has been there to ensure that all workers have a chance to work hard and earn a decent living. As we move to this phase of our civil rights journey, we are pleased to once again have Mr. Womack with us.

Justin, do you want to begin? We would be glad to hear from you.

STATEMENTS OF JUSTIN DART, JR., CHAIRMAN, PRESIDENT BUSH'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES; WARREN PHILLIPS, FORMER PUBLISHER, THE WALL STREET JOURNAL, AND FORMER CEO AND CHAIRMAN, DOW JONES & COMPANY, INC.; STEVEN COULTER, VICE PRESIDENT, PACIFIC BELL; AND RICHARD WOMACK, DIRECTOR OF CIVIL RIGHTS, AFL-CIO

Mr. DART. Mr. Chairman, it is an honor to appear before your committee today. As a Republican, as a former businessman, as a lifelong disability rights advocate, I call on the Members of Congress to pass and the President to sign the Employment Non-Discrimination Act of 1994. I call on all who love the American dream to support it.

Why am I, a disability rights advocate who is not gay, supporting this bill on sexual orientation?

Because millions of people with disabilities are gay and lesbian; because some of the greatest human beings I know are gays and lesbians who have made monumental contributions to my life, to my family, to my prosperity, and to my happiness—Pat Wright, here in this room, the mother of the Americans with Disabilities Act. I could not live with my conscience if I denied their call for simple justice.

I am here today because what Martin Luther King said is profoundly true: "Injustice anywhere is a threat to justice everywhere."

Effective protection of the right and responsibility to be productive is a foundational component of successful human culture. The productivity of each is essential to the prosperity of all. I have a vested personal interest in ensuring the maximal freedom and productivity of every person.

Mr. Chairman, as a wheelchair user for 46 years, I know about stereotypes and discrimination. Although I was an honor student in the field of education at the University of Houston, I was in 1954 denied a Texas teaching certificate because of my disability. And I have been denied scores of jobs since that time.

As a young man, I borrowed the down payment to buy a Sears Roebuck car so that I could deliver Houston Chronicle newspapers for 2 cents gross profit each, because that was the only job I could get. Later, I went deeply into debt to found small businesses because there was no other way to get a job.

My younger brother Peter was a top Air Force jet pilot and a degreed engineer when he was disabled by polio in the late 1950's. He struggled for more than 2 decades against overwhelmingly hostile attitudes. He too had problems finding employment. Finally, 6 years ago, no longer able to bear the pain of rejection by his beloved Nation, unwilling to accept dependency, he took his own life.

Tens of millions of my colleagues with disabilities have suffered the same rejection, with devastating results for the economy and for the quality of life in this Nation. President Bush estimated that it cost this Nation almost $200 billion annually to exclude people with disabilities from the productive mainstream. The human cost is beyond express in numbers or words.

That is why it was absolutely essential to pass the historic Americans with Disabilities Act of 1990. For the same kinds of reasons, the time has come to protect the basic rights of persons who are oppressed because of their sexual orientation.

In many ways, discrimination against gay and lesbian people is more vicious and violent than that suffered by people with disabilities. And you have heard the eloquent and moving testimony of Ms. Summerville and Mr. Dillon.

This discrimination is so pervasive and so intimidating that I do not feel at liberty to cite examples within my knowledge without permission from the individuals involved.

Mr. Chairman, historically, there has been opposition to civil rights. There is the assertion that civil rights is a kind of bothersome burden that do-gooders impose on sound business and sound Government, and Mr. Chairman, this is a dangerous fallacy.

Civil rights and free enterprise are two sides of the same solid gold cultural currency that has revolutionized the productivity and

the quality of human life. Our forefathers and mothers came to this country because we offered extraordinary legal guarantees of equal opportunity. They got rich, and America got rich. And every time we expanded those civil rights guarantees to include another oppressed minority, Americans got richer, and America became more democratic.

Civil rights puts the "free" in free enterprise. America is not rich in spite of civil rights. America is rich because of civil rights.

Mr. Chairman, some folks claim that civil rights laws are legitimate only in the areas of race, religion, and gender—and maybe disability. They claim that it is immoral to be gay or lesbian, and that it is okay to deny jobs to hardworking Americans because of who they love. Mr. Chairman, nothing is wrong with denouncing that which you believe to be immoral. Everything is wrong with acquiescing in vicious discrimination against American citizens because you disagree with their personal views and activities, activities which in no way infringe on the rights of others.

Mr. Chairman, when Thomas Jefferson wrote that all people are endowed by their creator with certain inalienable rights, he did not say "except for gay and lesbian people." Bigotry is bigotry. Bigotry is a cancer on culture that threatens all. Bigotry against gays and lesbians is un-American. It is personally obnoxious to me, and frankly, I think it is obnoxious to God.

Now, Mr. Chairman, there is the matter of family values. Is there a higher family value than the right, indeed, the responsibility, to work, to be all that one can be, openly, proudly, in the sunshine of the American dream? Is there a higher family value than that most profound love which commands mother and father, son and daughter, brother and sister, to nurture and to support each other in spite of all differences?

The gay and lesbian people I know are not amoral aliens from another plant. They are solid, hardworking, committed, and caring people. They hold my family values. Eventually, every family in the United States will have one or more members whose basic rights will be protected by this antidiscrimination act. This is not a law for somebody else. This is not a law for "them." This is a law for us, all of us.

The Non-Discrimination Act of 1994 will be another landmark of justice in the great tradition of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the ADA, and the Civil Rights Act of 1991. It will produce profits that will reduce public deficits and enrich business. It will enrich every citizen in terms of money and quality of life.

Finally, Mr. Chairman, there are no words to tell you how proud I am of America and of each one of you who supported the Americans with Disabilities Act. There are no words to tell me what it means to me and to millions of Americans with disabilities to be legally recognized as American citizens, as human beings.

You personally, Mr. Chairman, and many members of your committee, demonstrated authentic profiles in courage—Senator Harkin, the father of the ADA; Senator Metzenbaum and Senator Kassebaum, here today; Senators Durenberger, Simon, Hatch, Jeffords, Thurmond, Dodd, Coats, Mikulski. I am proud of all of you.

Senator METZENBAUM. Do not forget Kennedy.

The CHAIRMAN. Keep me in mind there. [Laughter.]

Mr. DART. Let us once again rise above politics as usual and set our eyes on love and justice. Let us once again provide profiles in courage. Let us join together, Republicans, Democrats, and just plain Americans, to support the passage of this just and necessary law and then to implement it in every heart and mind and community in America. It is the profitable and the productive thing to do. It is the right thing to do. We will keep the sacred pledge of liberty and justice for all.

Together—only together—we shall overcome.

The CHAIRMAN. Thank you very much, Mr. Dart, for a very eloquent and compelling statement.

[The prepared statement of Mr. Dart follows:]

PREPARED STATEMENT OF MR. DART

Mr. Chairman, it is an honor to appear before your committee today.

As a Republican, as a former businessman, as a life long disability rights advocate, I call on the members of Congress to pass and the President to sign the Employment Non-Discrimination Act of 1994. I call on all who love the American dream to support it.

Why am I, a disability rights advocate who is not gay, supporting this bill on sexual orientation?

Because millions of people with disabilities are gay and lesbian.

Because some of the greatest human beings I know are gays and lesbians who have made monumental contributions to my life, to my family, to my prosperity and to my happiness. I could not live with my conscience if I denied their call for simple justice.

I am here today, because what Martin Luther King said is profoundly true. "Injustice anywhere is a threat to justice everywhere."

Effective protection of the right and responsibility to be productive is a foundational component of successful human culture. The productivity of each is essential to the prosperity of all. I have a vested personal interest in ensuring the maximal freedom and productivity of every person.

Mr. Chairman, as a wheel chair user for 46 years I know about stereotypes and discrimination. Although I was an honor student in the field of education at the University of Houston, I was, in 1954, denied a Texas teaching certificate because of my disability. I have been denied scores of jobs since that time.

As a young man I borrowed the down payment to buy a Sears Roebuck car so that I could deliver Houston Chronicle newspapers for 2 cents gross profit each. Later I went deeply in debt to found small businesses because there was no other way to get a job.

My younger brother Peter was a top air force jet pilot and a degreed engineer when he was disabled by polio, in the late fifties. he struggled for more than two decades against overwhelming hostile attitudes. He too had problems finding employment. Finally, 6 years ago, no longer able to bear the pain of rejection by his beloved Nation, unwilling to accept dependency, he took his own life.

Tens of millions of my colleagues with disabilities have suffered the same rejection, with devastating results for the economy and the quality of life of the Nation.

President Bush estimated that it cost this Nation almost $200 billion annually to exclude people with disabilities from the productive mainstream. The human cost is beyond expression in numbers or words.

That is why it was absolutely essential to pass the historic Americans with Disabilities Act of 1990.

For the same kinds of reasons, the time has come to protect the basic rights of persons who are oppressed because of their sexual orientations. in many ways discrimination against gay and lesbian people is more vicious and violent than that suffered by people with disabilities.

This discrimination is so pervasive and intimidating that I do not feel at liberty to cite examples within my knowledge without permission from the individuals involved.

Mr. Chairman, historically, there has been opposition to civil rights. There is the assertion that civil rights is a kind of bothersome burden that do-gooders impose on sound business and sound government. This is a dangerous fallacy.

Civil rights and free enterprise are two sides of the same solid gold cultural currency that has revolutionized the productivity and the quality of human life.

Our forefathers and mothers came to this country because we offered extraordinary legal guarantees of equal opportunity. They got rich and America got rich. Every time we expanded those civil rights guarantees to include another oppressed minority, Americans got richer, America became more democratic.

Civil rights puts the "free" in free enterprise. America is not rich in spite of civil rights. America is rich because of civil rights. In combination with the work ethic and an irrepressible will to live the human dream, an every expanding consciousness and enforcement of civil rights forms the heart, the soul and the power of the American heritage.

But some folks claim that civil rights laws are legitimate only in the areas of race, religion, gender—and maybe disability. They claim that it is immoral to be gay or lesbian, and that it is OK to deny jobs to hard working Americans because of who they love. Nothing is wrong with denouncing that which you believe to be immoral. Everything is wrong with acquiescing in vicious discrimination against American citizens just because you disagree with their personal views and activities—activities which in no way infringe the rights of others.

Then there is the matter of family values. Is there a higher family value than the right, indeed the responsibility to work, to be all that one can be, openly, proudly in the sunshine of the Americam dream? Is there a higher family value than that most profound love which commands mother and father, son and daughter, brother and sister to nurture and support each other, in spite of all differences?

The gay and lesbian people I know are not amoral aliens from another planet. They are solid, hard working, committed and caring people. They hold my family values.

Eventually every family in the United States will have one or more members whose basic rights will be protected by this antidiscrimination act. This is not a law for somebody else—for "them." This is a law for us. All of us.

The Non-Discrimination Act of 1994 will be another landmark of justice in the great tradition of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the ADA and the Civil Rights Act of 1991. It will produce profits that will reduce public deficits. It will enrich every citizen in terms of money and of quality of life.

Mr. Chairman, many years ago President Eisenhower appointed a blue ribbon commission on goals for Americans. Persons of my age will recognize the names of the members of that commission: Canham, Conant, Darden Greenwalt, Gruenther, Hand, Kerr, Killian, Meany, Pace and Wriston. Their report stated:

The paramount goal of the United States was set long ago. It is to guard the rights of the individual, to ensure his development, and to enlarge his opportunity. Our enduring aim is to build a nation and help build a world in which every human being shall be free to develop his capacities to the fullest. We must rededicate ourselves to this principle and thereby strengthen its appeal to a world in political, social, economic, and technological revolution.

Abraham Lincoln sad this: I have often inquired of myself,what great principle or idea it was that kept this Confederacy so long together. It was not the mere matter of the separation of the colonies from the motherland; but something in that Declaration giving liberty, not alone to the people of this country, but hope to the world for all future time. It was that which gave promise that in due time the weights should be lifted from the shoulders of all men, and that all should have an equal chance. This is the sentiment embodied in that Declaration of Independence.

FDR said, "The power of love is always greater than the power of hate."

Finally, Mr. Chairman, there are no words to tell you how proud I am of America, and of each one of you who supported the ADA. There are no words to tell you what it means to me and to millions of Americans with disabilities to be legally recognized as American citizens, as human beings.

You personally Mr. Chairman, and many members of your committee demonstrated authentic profiles in courage. Senator Harkin, the father of the ADA. Senators Durenberger, Simon, Hatch, Jeffords, Metzenbaum, Thurmond, Dodd, Coats, and Mikulski.

Let us once again rise above politics as usual and set our eyes on love and justice. Let us once again provide profiles in courage.

let us join together, Republicans, Democrats, just plain Americans, to support the passage of this just and necessary law, and then to implement it in every heart and mind and community in Americ.. It's the profitable, the productive thing to do. it's the right thing to do. We will keep the sacred pledge of liberty and justice for all.

Together, we shall overcome.

Senator METZENBAUM. Mr. Chairman, I am going to have to leave, but could I just say one word?

The CHAIRMAN. Fine.

Senator METZENBAUM. Mr. Dart, I just want to say that I have seen you around here for a long time, and I have worked with you, and you are a damn good citizen. You are gutsy citizen, and I am just so proud that we are on the same side on so many issues, although we differ on some others. But I think that you have guts, and you are a stand-up and a speak-out guy, and I just want to say so publicly.

Mr. DART. Thank you.

The CHAIRMAN. Thank you.

Mr. Phillips, we look forward to your comments.

Mr. PHILLIPS. Thank you, Senator.

Mr. Chairman, Senator Kassebaum, good morning. My name is Warren Phillips. I was the chief executive officer of Dow Jones & Company for 15 years and also the publisher of The Wall Street Journal during that period, until the middle of 1991, when I retired at age 65.

Today, my wife and I run a very small business called Bridge Works Publishing Company, which publishes books, some fiction and some nonfiction.

I thank you very much for permitting me to appear before your committee this morning in support of the Employment Non-Discrimination Act of 1994.

Dow Jones employs 10,000 people, and a large part of its business is publishing newspapers. The Wall Street Journal is the best known, but it also publishes newspapers, as the Senator knows, in New Bedford and Cape Cod, also in Mankato, MN, Medford, OR, and a number of other places.

About half of our business these days is electronic publishing, the computerized delivery of information, and on both the print side and the electronic side, a little more than 25 percent of our business is international.

Like most businesses, it is dependent on brains, talent, and creativity. It would self-defeating for us, and self-defeating for American business generally in these competitive times, to limit the talent pool because of prejudice. Morally wrong, yes, but also poor business for us and for the country.

There are many editors I have known, writers, salespeople and others whom I have worked with over the years, both inside and outside Dow Jones, who have made superb contributions to the improvement and growth and quality of The Journal and other publishing enterprises—and some of these people happen to be gay and lesbian. The same can be said for talented gays and lesbians in our electronic divisions.

Even in the small business that my wife and I operate today, one of the five books we are publishing this year is a novel by a wonderfully lyrical writer, Kristina McGrath, who happens to be lesbian. The advance reviews of the book, entitled "House Work," which comes out in September—remember that—in the trade press have hailed her work as "flecked with brilliant, a domestic drama in the noblest, most wistful sense."

In my early years at The Wall Street Journal and Dow Jones, I was a correspondent in Germany. I covered the Berlin blockade and airlift, and I used to fly into the city on those old C47s that would leave the Rhein-Main Air Base every 30 seconds like clockwork, loaded with coal to sustain the beleaguered people of Berlin, flying into Berlin's Templehof airdrome in those days. I witnessed first-hand then, and in later years also, the response of our country and our allies to threats to individual freedom.

On the other side of the world, I once reported from and wrote a book on China, and I saw the cost in that society also of persecuting people because they were different.

My own father and my mother's family were immigrants to this country, fleeing societies that persecuted them for being different. Thus I have strong personal as well as professional reasons for supporting legislation designed to strengthen and expand our society's fundamental bedrock principle of being intolerant of intolerance.

I was at Dow Jones for 44 years in a wide variety of positions and locations, and I never saw a correlation between ability on the one hand, and on the other hand, race, or gender, or religion, or sexual orientation.

Our policy has been and is not to discriminate. My successor as chairman and CEO of Dow Jones, Peter Kann, restated that policy not long ago in the company-wide newsletter, and I quote: "I hope it is clear to everyone in the company that we consider it unacceptable to discriminate in our workplace against any colleague, other than to distinguish among individuals on the basis of job performance." He went on to that that that certainly covers discrimination on the basis of sexual orientation. "Prejudice does not belong in our workplace; talented people do," he said.

Today, more than one-fourth of the Fortune 500 companies—companies as diverse as Xerox, Boeing, RJ Reynolds, Chevron, Kodak—have explicit policies prohibiting discrimination based on sexual orientation. And since 1990, the number of corporations with such policies has tripled.

The increasing number of companies with nondiscrimination policies which include sexual orientation shows that real change is occurring in corporate America, and this change goes beyond simply large corporations. Smaller firms, such as Trek Bicycle, Fidelity Federal Bank of Glendale, CA, and the insurance company, Johnson & Higgins, have also moved forward with adopting inclusive nondiscrimination policies.

But while a growing number of businesses have adopted these policies, most gay and lesbian employees in the corporate American work force remain unprotected still. This lack of protection leaves a gaping hole in America's commitment to equal opportunity and is an invitation to the perpetuation of prejudice and stereotypes.

This bill, in my belief, supports business by helping to create an environment where all workers can produce and excel. This bill supports business by taking a tailored approach that does not require the provision of partner benefits, does not force a business to defend neutral practices which may have a disproportionate impact based on sexual orientation, and it specifically prohibits affirmative

action and quotas. This bill is about fairness, and I think it is more than fairly crafted.

It has been the law of the land that employment discrimination is unacceptable based on race, gender, religion, ethnic origin, or other nonperformance-related considerations. It is time to include sexual orientation. It is the right thing to do. It is the sensible thing to do. And it also is the businesslike thing to do.

The CHAIRMAN. Thank you.

Let me ask you, Mr. Phillips, for how many years has that been the policy of the company?

Mr. PHILLIPS. It has been an unwritten policy for—I cannot remember how far back—but we have always had very talented gay editors and writers. There were periods in the past, and I was present for some of them, where I remember there would be discussions about a person's gayness just as I also remember far enough back it was a problem with age, or when there were discussions about how could you send a woman report in to interview the CEO of this company, or how could you send a woman sales representative in to sell a businessperson. And there were discussions about gayness, also. So I could not put an exact year, but it goes back a ways.

The CHAIRMAN. OK. That is fine. Thank you.

Mr. Coulter.

Mr. COULTER. Senator Kennedy, Senator Kassebaum, Senator Wellstone, my name is Steve Coulter. I am a vice president with Pacific Bell.

On the issue before us today, I was asked to present both my personal experience as a businessman as well as my company's position. I am pleased to say that we share the vision of Senator Kennedy, Senator Chafee and others of a workplace free of discrimination. We think it is just good business.

Pacific Bell is a subsidiary of Pacific Telesis Group, one of the so-called Baby Bells. It is a California firm, with over 52,000 employees. We serve 10 million customers. Last year, it had $9 billion in revenue and assets of about $23 billion. Its markets and employees reflect the diversity that is California.

As a telecommunications company, we reach out to everyone. Five months ago, we announced a program to bring state-of-the-art telephony to every public library, public school and community college within 3 years. Two months ago, we started rewiring every residence we serve in California, a $16 billion project to bring home the information superhighway.

Pacific Bell has had a policy in place prohibiting discrimination against gays and lesbians since 1981. The company seeks to value diversity. It was not always so. There was a time when the company did not appreciate differences. There was a time when it preferred seeing the world as it wanted it to be, rather than as it was.

But the company eventually opened its eyes, learned, and came to terms with its environment. And Pacific Bell is, I believe, a better business because of it.

Today, 70 percent of the company's work force are women and minorities. Twenty or more years ago, most of the women in our company were operators; very few were in management. Today,

over half the work force and half the management team are women, with a third at senior levels.

Thirty percent of the Asians in the entire U.S. telecommunications industry work for one California Corporation—Pacific Bell; 23 percent of all Hispanics; African Americans make up 6 percent of the California work force and 14 percent of the Pacific Bell work force. Pacific Bell has a large number of gay and lesbian employees and customers. We provide service in six languages—one of the largest programs of its kind in America. We spend half a billion dollars a year with women and minority vendors.

In short, Pacific Bell has invested in diversity and believes it works. PacBell may be the most diverse major corporation in the Nation's most diverse State.

Our company is committed to pursuing sound business strategies which build on a strong economic and social foundation. Non-discrimination, and the next step, valuing a diverse employee body, is good business.

The legislation we are discussing today is just plain common sense. It is not an added burden. It is not a significant added expense. It reflects our values as a business.

I believe that a manager who cannot tolerate, cannot respect the diversity of the human family, is probably not a very good manager. Management is more than crunching numbers. It is motivating people to give their best.

My experience is that you motivate people more by lifting them up, not putting them down. If employees are afraid to be honest about who they are, if people are forced to build corporate closets, then they are using their energy and creativity for self-preservation rather than making the business more profitable.

There are those who say tolerance is too great a burden. I hope we face them as competitors. If you can capture the talents of a diverse work force and reach out to a diverse population, you have a powerful competitive edge. Fairness is not burden; it is an advantage.

No company is perfectly; certainly not PacBell. But it makes an effort. All companies should. A growing number of States, localities and businesses now prohibit job discrimination based on sexual orientation. When I learned that in 42 States, it is still legal to fire someone because he or she is gay or lesbian, I was frankly shocked. That is wrong, and a key reason why I am here today before you.

This bill is very narrowly drawn. No special privileges. No quotas. Religious groups, small businesses and the military are exempt. It fits easily within our own way of working, and it brings uniformity to the law.

Pacific Telesis Group and Pacific Bell support this legislation. It is good public policy and good business. It is also the right thing to do.

Thank you.

The CHAIRMAN. I want to commend both of you—we kind of expect it of the AFL. We will put in the record other letters of strong support. I think you really make a difference. When we are able to get this kind of support coming from various different vantage points, it is a very powerful force. I think you and your company deserve a lot of credit.

We will include letters from Xerox, Microsoft, AT&T, Honeywell and Borland International. I think it is important that we in the Congress know, and the American people and our constituents know, that much of the corporate leadership out there is working to knock down these barriers. So we are very, very grateful to you.

[The letters referred to appear at the end of the hearing record.]

The CHAIRMAN. Richard Womack, we are glad to have you here, we look forward to your testimony, and appreciate the leadership of the AFL in this area as well.

Mr. WOMACK. Thank you, Mr. Chairman, and other members of the committee, for having me here this morning.

My name is Richard Womack, and I am the director of the department of civil rights for the AFL-CIO. It may not be apparent to all, but let me State for the record: I am a black man, a black man who has faced discrimination, bigotry, hatred, and yes, even bias. I know the suffering, and I know the pain. So I think it is incumbent that we participate in these hearings and support S. 2238.

By resolution of our convention, the AFL-CIO has stated that it is long past due for the passage of such legislation, the Employment Non-Discrimination Act prohibiting discrimination in employment based on one's sexual orientation.

The AFL-CIO is comprised of 80 affiliated national unions, with a membership of over 14 million. I think that speaks well in terms of what it is we do in terms of workers. Historically, the AFL-CIO has been a strong supporter of civil rights legislation prohibiting discrimination in many areas—voting, housing, and yes, even in terms of other areas that we see pertinent in the workplace.

I think it also goes to the point of sex, religion, and people with disabilities. We have been in the forefront of those fights. It was then president George Meany who then insisted that we have a Title VII in the Civil Rights Act of 1964 which prohibits discrimination based on race, sex, creed, and national origin. It was the labor movement who said we should punish wrongdoing within our own ranks, and yes, even in our society.

So it is not hypocritical for us to come here today and say that we support this legislation to prohibit wrongdoing for people who have an urge to express their sexual preference. It is a fundamental principle of the AFL-CIO that civil rights be extended to all of our citizens in a democratic society.

Support of the Employment Non-Discrimination Act of 1994 is part of our commitment to that principle. We believe that it is the responsibility of trade unions to guarantee that their workers be judged on their work and not by criteria that are not job-related. Dismissal, harassment, and intimidation of workers for reasons unrelated to job performance is an employer tactic well-known to the labor movement. We protect any action against a worker solely on the basis of sexual orientation, and we support legislation at all levels of Government to guarantee the civil rights of all persons without regard to sexual orientation in public and private employment.

When an Arizona judge rules that "an employee is not wrongfully terminated because he is fired for being gay," then it is time to

change the law. When an employer dismisses an employee because that employee is a lesbian, then it is time to change the law.

If that law were changed, then the Cheryl Summervilles; yes, and the Ernest Dillons, would not have to work in fear, would not be intimidated or harassed. We need this law.

Let me just say this to all of us. It is time to stop blatant workplace discrimination. Workers in many occupations have been fired and continue to be fired because they are gay or lesbian. In the workplace, the AFL-CIO believes people should be judged on their work, not on their religious preference, not on their race, not on their national origin, and certainly not on their gender.

Discrimination or firing someone for those reasons is against the law. Workers should not live in fear of losing their jobs or being denied promotions because of their sexual orientation. That also should be against the law.

We congratulate Senator Kennedy and Senator Chafee and all the cosponsors of S. 2238 for their leadership in introducing this legislation. The proposed legislation is straightforward and consistent with antidiscrimination provisions and legislation which protect minorities, women, people with disabilities, and yes, even seniors. The bill also contains, as many people have already said, provisions which prohibit quotas and preferential treatment. And it does not require an employer to provide benefits for the same sex partner of the employee.

This is something that many of our unions have collectively bargained for, and they will continue to do so. Violence motivated by racial, homosexual, religious, and ethnic hatred is repugnant to the American ideal of equality. That such acts persist, even flourish, is a reproach to each of us and a symptom of what I call a serious failure within our Federal and State systems of justice. We must correct this by making sure that we enact S. 2238.

Again, we firmly support this legislation, believing that employment decisions should be made on the basis of an individual's ability to perform his or her job. Recent polls have shown that three-fourths of the American people believe that there should not be this kind of discrimination in the workplace. This legislation is long overdue. Eight States have so stated, and many localities have adopted this kind of legislation. It is time that the Federal Government act to enact such legislation.

We look forward to working with you to ensure that S. 2238 is passed by Congress and signed by the President, granting legal protection from employment discrimination to persons who have been historically denied equal opportunity in the workplace.

It bears repeating that this is a matter of fairness and simple justice. Gays and lesbian Americans do not want to be ushered in secretly through the servants' entrance; they want to walk through the front door. For all of its self-declared greatness, the United States should be ashamed of the enormity of discrimination that pervades throughout it.

If you are homosexual, a woman, a person with a disability or a minority, you are forced to fight with whole heart and soul for rights that should be a given. Some institutions, and yes, some people, who are consumed with unfounded anger and hatred—unfounded, I say—toward harmless individuals have become breeding

grounds for misinformation. Homosexuals are only targets of hatred from obtuse ignorance.

Let me close by saying that I have with me a statement that has been signed by numerous of our unions that I would like to enter for the record.

Thank you for having us, and we will support you in this effort.

[The prepared statement of Mr. Womack appears at the end of the hearing record.]

The CHAIRMAN. Thank you very much. We will include the statement in the record, as well as statements from Deval Patrick, the Assistant Attorney General for Civil Rights; Senator Chafee; Senator Goldwater; the Reverend Edmund Browning, the presiding Bishop of the Episcopalian Church; Coretta Scott King; Mary Frances Barry, who is chair of the U.S. Civil Rights Commission; and Anthony Carnevale, chairman of the National Commission on Employment Policy.

[The prepared statements referred to appear at the end of the hearing record.]

The CHAIRMAN. I have no questions, and I am going to ask Senator Wellstone to chair the remainder of the hearing. As you probably know, we are in the process of consideration of Judge Breyer for the U.S. Supreme Court, and I will have to be in attendance over on the floor, so Senator Wellstone will chair the remainder of the hearing.

I thank all of you, and I want to give the other witnesses my assurance that I look forward to reviewing their testimony.

Senator WELLSTONE. [presiding]. Thank you, Mr. Chairman.

Let me first ask Senator Kassebaum if she has any questions of the panel.

Senator KASSEBAUM. Yes, I have a few. First, I would just say how much I appreciate everyone's testimony. I think it speaks to the importance of the business community, as spoken to by both Mr. Phillips and Mr. Coulter, and the AFL-CIO, I might add, to take a leading position on their own, without legislation.

I think there is no one who would question the importance of having a workplace free of discrimination. It helps to have a policy.

I would ask you, Mr. Coulter—you do not ask someone, of course, whether he or she is gay or lesbian. I mean, how do you know for sure your workplace is as free as possible of discrimination?

Mr. COULTER. Well, we have had the policy in place since 1981. If someone has a problem, they take it to their supervisor. Even with a policy in place, we have had problems periodically. The company created a gay and lesbian employee group, GALEMAS—the employees did it on their own—and when it first came out about 4 years ago, there was harassment. Some of their posters were torn down, they got some obscene calls on their voice mail number. And they went to their supervisors, and we managed to trace back the group where the messages were coming from, we figured, and the boss basically pulled his staff together and said, "I do not know who is doing this, but knock it off. This is not the way we operate as a business. And if I ever catch anybody doing this, you are out."

You do not know who is gay or lesbian. We do not care. All we care about is the quality of your work. But if there is a problem, there is a rule in place, and we support it, the top management.

Senator KASSEBAUM. That is what is important, to have the avenue to do so if someone accuses you discrimination. If they have been fired, you can then make the case that your policy is one that does not discriminate, and so the reason they may have been terminated is purely based on job performance.

Mr. COULTER. Right. Creating an unhealthful discriminatory environment could be cause for—certainly, for discipline of some sort, not always dismissal. If it was bad enough, certainly, it could lead to that.

Senator KASSEBAUM. I think, in the case of Mr. Dillon, it is unfortunate that he did not receive greater support from his supervisors and his union in the workplace. I guess that would have been the Federal employees' union since he was a postal worker.

Mr. Womack, I would like to ask you what is the AFL-CIO doing to reach out and work with the gay and lesbian community in a positive way in the work force?

Mr. WOMACK. Let me say that I think what we have tried to do—and I think we are doing a real good job of it—is we have throughout the United States 50 State AFL-CIOs and numerous Central Labor Councils—in fact, I would say probably in the neighborhood of 800 local central bodies. We have been getting them involved in their communities, with different groups, to support their efforts, and we have also been educating our members, because like I said, there is a lot of misinformation out there. We have been trying to correct that, set the record straight in terms of what our role should be in terms of making sure that our members understand what the issues are and how we can best deal with those issues.

We have been sitting at the bargaining table with employees, trying to negotiate language that will protect the sexual orientation of people, and we have been very successful in doing that. I think our unions are really coming around, and that is why I wanted to introduce this statement. Many of our international unions have already reached out and set up committees. We are working with the Gay and Lesbian Task Force across this whole United States. We have within our own ranks coalitions. We have the women's coalition, the black coalition, the Hispanic coalition, even the lesbian and gay coalition, within our own unions. So I think we are really out there, trying to educate our members.

Senator KASSEBAUM. I think you have touched on something that is important. No matter how much may be written into law, if there is not also a growing understanding of tolerance and education there will be little progress. Mr. Phillips, that leads me, then, to the press and to the media, and the importance of understanding and education. I do not believe the press has done as much as it should. This is largely because, unfortunately, we all tend to respond to differences more than we do to good works—of Pacific Bell, for instance. It is the clash that is shown on the evening news, rather than the positive.

What can the press do to help with an understanding of this. Because clearly, there are some significant divisions of opinion—as you know, Mr. Dart—even with the disabled and their acceptance even with the law. So a lot must come through education, and the media plays a crucial role. I do not know that The Wall Street Journal has necessarily made it a focus of their concern in trying

to help create an atmosphere of tolerance and understanding and education.

Mr. PHILLIPS. I think one of the things the press can do—and I would relay this from personal experience within our own organization—is to make sure that able people who happen to be gay or lesbian are advanced within the organization, so the fact is, that we have had, for instance, a page 1 editor in charge of all those stories on page 1 who is a gay man; we have had gay individuals on the editorial page; we have had numerous writers. The current president of the National Association of Gay and Lesbian Journalists is a former Wall Street Journal reporter.

So the gay and lesbian reporters and writers are well-represented on the staff. Their colleagues know and work with them, and I think that helps to create an understanding of what some of the issues are so that you do not have people writing about these issues who are either totally ignorant themselves, or have never worked alongside gay and lesbian writers and editors and have an appreciation—or lack an appreciation—for their talents and abilities.

Senator KASSEBAUM. I understand, and I appreciate the position you have taken. I think it is important. I would just urge that there is more that can be done in the way of education, because no matter how much legislation we have, until there is a broader understanding of gay and lesbian sexual orientation issues, it is going to be very difficult to have tolerance and acceptance that will lead to a creative and constructive working environment.

The absolute hatred that existed toward Mr. Dillon and Ms. Summerville is something that everyone finds offensive. But not just the law can help there. It really takes more than that. I think that is where the media has a long way to go in helping to create greater understanding.

Thank you.

Mr. PHILLIPS. Thank you.

Senator WELLSTONE. Just two quick questions. First, I just want to say to Senator Kassebaum that I think her point is so well-taken about the importance of education. I am also thinking back to when I was a student at the University of North Carolina during the civil rights movement, when people were also arguing then that we cannot do anything in terms of legislation, and it just has to be education, or it will never change—but the education ended up giving people protection and really kind of ended up overturning a system of apartheid. So in a sense, I think the two things can really work together.

But when we get that Wall Street Journal editorial, that is when I know we will be well on our way. That is what we are looking for here; that is what we are looking for. I cannot wait to wake up one morning, have my cup of coffee, and just see it—praise the Lord.

Mr. PHILLIPS. We also operate the newspaper in Mankato. How are they doing?

Senator WELLSTONE. Just great. [Laughter.]

Let me just ask two quick questions, and I will start with Mr. Dart, but each of you may want to respond. One of the arguments that is made is that sexual orientation is different—different than

race or religion or gender or disability—and therefore, it does not deserve civil rights protection. That is one of the arguments that is being made.

I think I will start with you, Mr. Dart, and just ask you how you would respond to this argument, and then if the rest of you want to as well, please do so, because I think that is part of the debate.

Mr. Dart.

Mr. DART. Well, I do not agree with that. As I said in my testimony, Mr. Jefferson did not say that we are endowed by our Creator with certain inalienable rights, excepting gays and lesbians. I think bigotry is bigotry; bigotry is a cancer on society; bigotry is a cancer on business and on families and on every individual—and I do not think it matters whether it is bigotry in regard to race or religion or gender or sexual orientation. It has the same negative effect on society. It has no place in America. We have got to do something to fix it.

And Senator, I would like to comment on the previous subject, on the matter of education, if you will, versus legislation.

Senator WELLSTONE. Although I do not think it is a "versus."

Mr. DART. I do not, either. That is what I am about to say.

Senator WELLSTONE. Oh, I am sorry. I thought you were, but I thought you would say it so well, and I would beat you to the punch.

Mr. DART. I believe that we have a tradition, and it is in the mainstream of our culture, that when America comes in its conscience and in its wisdom to the decision that it is time now to make another great step forward to fulfill and to implement Mr. Jefferson's great experiment, that we do this through legislation or through Government proclamations like the Emancipation Proclamation, and that that is accepted in our culture as the ultimate education. I think the Civil Rights Act of 1964 was an excellent example. How many of us could authoritatively cite the provisions of that law? But one thing all of us can do is we know that that law means that henceforth, there will be no discrimination against African Americans, Hispanics, women, people of particular religions. And I think the greatest impact of our great civil rights laws is educational, and I think that that cannot be separated.

Senator WELLSTONE. I thank you.

Let me just ask another quick question, unless somebody else wants to respond—I want to make sure that all the panels have a chance today. I think it was Senator Kassebaum who asked you, Mr. Womack, about work that you have been doing with the work force on this set of issues; but what do we do with the 75 percent of the work force that works in companies that do not have policies like Pacific Bell? Where is the protection for them? And I guess the question maybe from a business point of view is does that prejudice end up interfering with, if you will, good economic management decisions? Is that the issue, that for a lot of the work force, there is no protection?

Mr. WOMACK. I think you have hit the heart of the issue. The fact is that without law, there is no protection. And let me go back and State it a little differently, because I think Dr. King probably said it better than anybody really could have said it. He said: "The law may not make you love me, but it will keep you from lynching

me." And I think in this instance, what we are saying here is that we need a law to stop some of this pervasiveness that takes place. It cannot make you love me, but it will stop you from doing some of those acts you are doing. Education is very key.

I do not think that it is sound business practice—and I think some people rely on this, saying, "I will lose customers if I hire people who may be lesbian or gay." That is not a proven fact.

I would also use the civil rights experience, and I can relate, because I am old enough that I have experienced some of these things. When I entered the armed services, there were some people who felt that I was much different than other folks. They put out this misinformation that blacks somehow or other had tails, or they were less than humans. And some folks looked around and said, hey, you do not have one of those things that I have been talking about, and it is that type of thing that we are talking about—education. And I think it is very key to this whole element, letting people understand what the issues are and how people function every day. Just because you have one life style does not make you any better than someone else with a different life style.

Senator WELLSTONE. Do either of you have a final comment, just to bring this panel to closure? Mr. Phillips, or Mr. Coulter?

Mr. PHILLIPS. I would just comment that, on the argument about how gays and lesbians will drive customers away, that argument has been made throughout history. It was made that blacks serving in restaurants or insurance companies would drive customers away. It was made, as I mentioned a moment ago, within our own company that you could not send women out to sell advertising to male executives. It is an old argument, and it has fallen down in each case, whether it is gender, race, handicap. In the service industries, in our company, elsewhere, no one thinks about it anymore, and it is going to be just as short-lived in the case of gays and lesbians, I am convinced.

Senator WELLSTONE. Mr. Coulter, would you like the final word?

Mr. COULTER. As a representative of a very large, very conservative, cautious corporation, I think I can say that we think the Employment Non-Discrimination Act of 1994 is a legitimate part of the civil rights struggle and needs to be enacted.

Senator WELLSTONE. Thank you very much. I thank all of you.

On the third panel, we will hear first from Joseph Broadus, who is a professor of law at George Mason University Law School. Next, we will hear from Robert Knight, who is director of cultural affairs at the Family Research Council. And finally, we will hear from Chai Feldblum, a professor at Georgetown University Law Center.

Although you have different perspectives, each and every one of you are welcome here, and we look forward to your testimony.

We will start with you, Mr. Broadus. Thank you for being here.

STATEMENTS OF JOSEPH E. BROADUS, GEORGE MASON SCHOOL OF LAW; ROBERT H. KNIGHT, FAMILY RESEARCH COUNCIL; AND CHAI FELDBLUM, GEORGETOWN UNIVERSITY LAW CENTER, ON BEHALF OF LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. BROADUS. Thank you for the opportunity to be here, Mr. Chairman.

There has been a great deal of talk today about how the bill will prevent discrimination against gay citizens. But an appropriate reading of the bill reveals that it will prohibit far more than that. It will prohibit discrimination on the basis of sexual orientation, which is defined to include identity, acts, associations.

What this means is that the bill renders irrelevant for employment purposes not just one's status, but one's behavior, and says that whether this behavior is legal or illegal, on-the-job or off-the-job, under this enactment, that behavior is no longer relevant.

And a series of hypotheticals will quickly establish that, unlike religion, unlike race, unlike national origin, unlike religion, it cannot as easily be said that as a general proposition, or at least in some particular cases specifically, that sexual orientation is irrelevant and that the only factor is job performance, measured to exclude the sexual orientation behavior. And it is important to understand that the definition of sexual orientation is so broad that it does not just protect homosexuals and homosexual acts, but straights and straight acts that might be presumed to be offensive. I will give three examples that are taken from headlines about work in both the private and public sectors which will demonstrate why this legislation as it is written intrudes upon the capacity of managers to make sound decisions about their employees, and why sexual orientation behavior, defined to include just about all sexual acts by gays or straights, can be relevant to the employment situation.

I start first with a case that involves a law firm and an attorney who was employed by that firm, who was known by that firm to be homosexual. It did not affect either his position with the firm or his potential for advancement. This was well-known for years, when, after some time, what could be called behavior patterns began to develop that were disturbing to the firm.

The first involved an incident in the firm offices where the attorney was involved in an incident with a client where the client made the allegation that he was sexually approached by the attorney. The firm sided with the attorney in this incident.

It was followed by three or four other incidents in which the attorney, away from work, was publicly involved in incidents of a sexual nature that were publicized, that were embarrassing to the firm. Still, nothing happened.

Finally, in a final incident, this attorney received widespread publicity because of a break-in at his home. Because this was in an exclusive area, people were very concerned about the spread of crime into what should be safe areas, and the police acted quickly to find the suspect. The suspect proved to be a 16-year-old boy who was a runaway, who made the claim that he was sexually accosted by this person.

Now, notice that this activity is away from work; it only concerns sexual orientation; it may not have any immediate effect on, technically speaking, how this person is processing cases inside the office. But clearly, this repeated train of highly publicized activities clearly has an effect on the standing of the firm and on the reputation of the firm and the ability of this firm to function on behalf of its clients, and the nature of this behavior—not merely the behavior, but the nature of this behavior—raises questions about the

discretion and judgment that is employed by this person generally in the pursuit of the activities of the client.

And it raises another question, and that is the question of what do we mean when we say "character"? Historically, Americans have considered sexual behavior to profoundly reflection the nature of someone's character and the values that that person has. And clearly, these episodes put the firm in a position where it had to take some action to cut its losses.

A second example would be the example—again, from a recent newspaper account—of a teacher, a female instructor, at a public school who was, after school hours, engaged in sexual activities with some of her students. Now, under the definition of this statute, are all of these activities defined by the statute to be irrelevant to performance, including in these cases where the person has a professional relationship?

Does this statute reach professional regulations which prohibit counselors and psychologists and others from having sexual activities with their clients, gay or straight, because it says that in the workplace, this behavior is irrelevant?

Does it reach regulations of the professional bars which put limitations on lawyers, gay or straight, from having relationships with their clients under certain circumstances, because those kinds of relationships would only be acts or associations that manifest their sexual orientations, gay or straight?

There clearly are many episodes and incidents in which someone's sexual behavior is relevant to his or her performance in a profession. There are many State regulations which provide for or regulate the sexual activities of lawyers, doctors, and others with clients and under circumstances. And this bill comes along and says, as to sexual orientation, that it is always irrelevant to employment decisions, and as to sexual orientation, not just defined as status but also defined as acts and associations, that these things are always going to be irrelevant to employment decisions. The sweep of this bill in doing that goes too far.

Another example might be the case of—because you talk about the breadth of the religious exemption, and I will give you another example of what could happen under this bill—assume for a second that you are a religious publishing and supply company, and you employ a travel Bible salesman. that Bible salesman is arrested on the road for inappropriate sexual conduct. Can you, under this Act, for an act which merely manifests sexual orientation, gay or straight, deal with or discipline this person when it reflects upon the community and character and integrity of the people you routinely deal with, and can you say, as the gentleman from PacBell said, under that circumstance that you can expect that this will not reflect upon your company and its product and the integrity of what you provide for that community?

We have also been told that this bill is limited in that it will not permit for disparate impact claim for effects claims, and that is somewhat doubtful given the structure of the bill. The bill prohibits the employer from implementing quota programs, and it prohibits the courts from using disparate impact analysis in order to prove a claim of discrimination.

But the language of the coercion provision of your section 12 tracks the language of section 8(a)1 of the National Labor Relations Act, and it is in fact 8(a)1 which originally gave birth to effects and disparate impact analysis. So what you will do with this bill is what has already happened in Title VII, and that is bifurcate claims between disparate treatment claims in which you want to prove you have been denied an opportunity to use disparate impact analysis, and now designate it coercion or effects claims, which will have available statistical analysis. Worse yet, those claims will not be limited by the defenses historically provided by disparate impact analysis under Title VII, and as a result, it will make it even easier, once they have been designated coercion claims, to proceed with them under this bill than it would have been to proceed with a comparable claim under Title VII.

And it is important to understand that while the language appears restrictive, the language of "coercion" and "threatens" in the bill appears restrictive, that very similar language about "coercion" and "restraint," in the Labor Act has been read very broadly to include a range of acts, including acts favorable to employees, that one on the surface would not expect would produce these problems.

It cannot be said, given that history and given where this language comes from, that this bill cannot be expected to result in a problem with quotas.

The next problem is the relationship between the retaliation and participation provisions and the coercion provisions. Retaliation and participation provisions routinely found in civil rights acts have been held to be limited to protection of lawful activities undertaken in good faith, undertaken in both subjective and objective good faith. But not so these coercion provisions that resemble 8(a)1, because you can compare the Labor Act prior to the addition of a "for cause" provision with the Labor Act afterwards, and it is clear that these will protect legal as well as illegal acts and may put in doubt a large range of relevant——

Senator WELLSTONE. Mr. Broadus, you need to finish up. I wanted you to go on, because it is a view that I do not agree with, and therefore I did not want to cut you off at all, but we are trying to stay within 5 minutes.

Mr. BROADUS. So just to conclude, I think it cannot be said that sexual behavior is not relevant to conclusions about character; that there are many cases in the workplace where sex would be relevant to professional performance, and it is important that this legislation not sweep so as to prohibit employers from regulating in those instances.

Senator WELLSTONE. I wonder—we have two other lawyers——

Mr. KNIGHT. I am not a lawyer.

Senator WELLSTONE. [continuing]. One other lawyer who will respond. I am not a lawyer, either, and that is what I was about to say. My impression, as I read this legislation is that the conduct rules apply evenly across the board, and maybe we will get back to that in some of the other testimony, so I will not respond.

Since I have to preside over the Senate at 12:30, I do have to ask you, Mr. Broadus, one question, which is important to me, and that is why I have to ask it to you. In your testimony, you point out

that, quote, "homosexuals on average make plenty of money, so why should we protect their rights." End of quote.

Mr. BROADUS. That is not a quote.

Senator WELLSTONE. Let me find it in the testimony. Let me read it. "These life style advantages were enjoyed because gays were much more likely to be college graduates. Fully 60 percent of gays surveyed were college graduates, compared with 18 percent of the general population. This is not the profile of a group in need of special civil rights legislation"—that is really what I was referring to; it was not a direct quote—"in order to participate in the economy or to have an opportunity to hold a decent job. It is the profile of an elite. An elite whose insider status has permitted it to abuse the political process in search, not of equal opportunity, but of special privilege and public endorsement."

What is the point that you are making there?

Mr. BROADUS. The point that I am making is that with the prior Civil Rights Acts in the case of race, the starting point was a desire to correct gross disparities in earning potential, gross disparities in participation in education and participation in employment; it was a desire to correct those disparities.

The same thing is true with the handicapped, where these disparities are even greater. There, you had 50 percent of the people not even participating in the economy. But the evidence on sexual orientation—not the episodic evidence, but the evidence overall—is that for the class, the income is higher, for the class, the possibility of participating meaningfully in education, of working in the corporate sector, being a manager—these things are all higher.

Why would you have—this is not——

Senator WELLSTONE. Let me tell you why. Maybe I can answer the question. I will not go with the methodology of this. You cite the Simmons report as your source for both annual income and educational level, and as I imagine you are aware, that is a study of the readership of a gay magazine, not necessarily a representative sample.

But beyond that methodological point, when you say, "This is not a profile of a group in need of special civil rights legislation in order to participate in the economy or to have an opportunity to hold a decent job," and we are talking about the issue of discrimination, as a Jew, I have a real problem with what you say.

That is precisely the kind of argument that has been made about Jewish people. That is precisely the kind of argument that was probably made in Germany. You have Jewish people, you have a special—you do well—I just simply quote you—you are not a group of people who need special protection. You do well economically. You are an elite. That is precisely the argument that has been made in behalf of the worst kind of discrimination against Jewish people.

What is the difference, sir?

Mr. BROADUS. The difference is that the starting point for remedial legislation must be or should be in sound policy process, injury. In the absence of injury, what is achieved by remedial legislation? And beyond that, there is still the problem of answering the basic question of whether or not engaging in various kinds of sexual acts, or having a propensity to do that, reflects upon character.

Now, only recently, the Senate passed legislation on the agriculture appropriation, prohibiting that Department from using its funds to advance the notion that homosexuality was on an equal footing with straight behavior. Only last year, the Congress took action because it thought that homosexual orientation and behavior was, relevant to one's performance in groups, relevant enough so that it should affect participation in the military.

In this legislation, unlike any other civil rights legislation, you create an exemption for religious organizations to discriminate not on the basis of religion, but to discriminate upon the classification that is core to the legislation, and that is an acknowledgment and a recognition by this body that on religious grounds for those institutions and for many people, this is a relevant category. The same thing as to the domestic partner exemption.

Senator WELLSTONE. Well, if you will permit me to interrupt you, that is a very long, lawyerly-like answer to the question I put to you. "This is not the profile of a group in need of special civil rights legislation in order to participate in the economy or to have an opportunity to hold a decent job." And as a member of a group that has economically done well and faced precisely the same kind of discrimination, I want to tell you how much I resent that argument that you have made.

You can say whatever you want to say. I just told you what I want to tell you about the argument. I find it to be problematical, at best.

Mr. BROADUS. Senator, the one thing that we have always believed in America about religion is that the holding of religious faiths—one of the reasons we protect religion, other than the problems of the disorders that you get with religious bigotry, is that we believe religion is fundamental to helping to mold and provide the attributes of character that are so important to citizenship. And this has been a long-term faith, that religion, whatever the religions that people have, contribute to the developments of character and contribute to that person's qualities which they can then contribute to the society as a whole.

Now, if you want to draw a distinction between sexual orientation and religion, you can draw it on that basis. If you can make that same statement about sexual orientation that you can about religion, and that basic value that underlies our protection of religion, if you can make that same statement, then you can put them on equal footing.

Senator WELLSTONE. Well, that is, of course, the very question behind this piece of legislation, which is that this legislation says that we treat each and every citizen as being fully human and with dignity, that we judge people based upon the content of their character, and that we do not discriminate. So I suppose that is the premise that I accept and for which I make no apology.

But one more time, I just have to tell you—and I do not want to take up any more time—that as an American Jew, when I looked at this in your testimony, it was just right there in front of me, and I thought, my gosh, my God—that kind of argument is precisely the kind of argument that was made by people who used it as a justification for denying any protection for Jewish people. That is my point.

We can go on. Mr. Knight.

Mr. KNIGHT. I would like to start by pointing out that that very same argument was made by Judge H. Jeffrey Bayless in the Colorado Amendment 2 case, when he denied minority protected class to homosexuals. He cited evidence that homosexuals do very well economically, do not lack political clout, and it has not been proven that homosexuality is an immutable characteristic.

So you know, if you are tossing charges of bigotry around, you might address Judge Bayless as well. And he is no conservative. I do not know what his religion is. He made a judgment based on assessments by six Federal courts that ruled the same way.

So I think there is a lot of legal evidence that that is a mainstream view that does not represent bigotry. And I know a lot of Jews who would be offended by those comments as well. Don Feder, the columnist for the Boston Herald, does not feel that homosexuality can be equated with his Jewishness in any way. Daniel Lapin, a rabbi with the Rabbinical Alliance of America—a lot of Jews disassociate themselves entirely from the comparison with sexual orientation. I just thought I would State that up front.

Senator WELLSTONE. Well, you can——

Mr. KNIGHT. And there has been a lot of talk about family values here, too, and I think some clarification is in order there, too, if you would permit me——

Senator WELLSTONE. Please.

Mr. KNIGHT. [continuing]. Because the witnesses were compelling, the people who were victims of what they said was discrimination. And your heart has to go out to them because they lost their jobs—or, one of them did—and no one likes to see cruelty to anyone. Certainly, gay-bashing is wrong, hatred is wrong. But the description of family values, basically, as a person doing his or her job, walking their dog, that sort of thing—let us be honest—family values have nothing to do with walking your dog; anybody can do that.

These, in and of themselves, are fine things, but they can be accomplished by anybody, and it has nothing to do with values. Everybody from moonlighting burglars to people who enjoy group sex could be walking their dog some night.

To define family values without mentioning sexual morality broadens the definition to make it meaningless. Family values is foremost about sexual morality; that is what it really means——

Senator WELLSTONE. Mr. Knight, could I interrupt you?

Mr. KNIGHT. [continuing]. It really means——

Senator WELLSTONE. Could I interrupt you, not to disagree with you, although we do not agree, but just to let you know that the reason why I am leaving is that I have to preside——

Mr. KNIGHT. I understand. You said that already.

Senator WELLSTONE. But I do not want you to think I am walking out.

Mr. KNIGHT. Oh, no, no, no.

Senator WELLSTONE. And they cannot find anybody to preside, and Senator Kassebaum is going to be kind enough to chair this committee hearing. And believe me, I want to stay, because I think there is much more that can and should be said, and I cannot. Presumably, we will get a chance to talk more.

I apologize for leaving. I really do not want to appear to be impolite.

Mr. KNIGHT. That is fine. I understand completely.

Senator WELLSTONE. I do apologize to you.

Mr. KNIGHT. OK. Family values is about respecting marriage for what it is. It is the bonding of one man and one woman. It is about encouraging sexuality inside marriage and discouraging it outside marriage, because adultery, homosexuality, and premarital sex are harmful to individuals, families and communities.

The historical record is clear. Every culture that has abandoned marriage and confining sex within marriage has been quickly destroyed soon after they did that, in all continents and all times.

Now, the stories that we have heard are compelling. Again, nobody likes to hear about suffering, and no one likes to inflict it. But I have to tell you, speaking for a pro-family organization, that we feel just as strongly about what kind of world we are creating for our children and our families. We see the Employment Non-Discrimination Act as less about tolerance than about the Federal Government forcing acceptance of homosexuality on tens of millions of unwilling Americans.

The bill essentially takes away the right of employers to decline to hire or promote someone who openly acknowledges behaving, or indulging in behavior, that the employer or the employer's customers find immoral, unhealthy and destructive to individuals, families and societies.

Martin Luther King has been quoted several times here, so I will not do it again, but we believe people should be judged by the content of their character, and sexual behavior is part of character. It is the very essence of character.

I have talked with some Jewish scholars, and they said that the beginning of morality is sexual morality, and that is why the scriptures and several religions deal with it so often.

If this bill becomes law, for the first time in history, Americans will be told they must hire people they believe to be committing immoral acts precisely because they commit those immoral acts. This interferes with freedom of association, freedom of speech, and freedom of religion.

The great religions of the world condemn homosexual behavior in their scriptures. Now, the sponsors of this legislation purport to tell Orthodox Jews, orthodox Christians—and that is lower-case "orthodox," but probably also upper-case—Orthodox Muslims, of which there are 6 million now in the United States, as well as members of other faiths that they can no longer allow their religious beliefs to influence their private business decisions.

The American Revolution was fought over less intrusion into the lives of the colonists.

The bill does contain a religious exemption, it has been noted, but for-profit activities by religious organizations are specifically removed from that protection. It is unlikely that the religious exemption could retain its strength because the courts may construe it narrowly, removing many organizations that may in fact have a religious viewpoint but not a specific, formal relationship with a church.

The Mormon Church would be particularly vulnerable, since the church leadership is often supported through for-profit corporations.

But other religious institutions would be put at risk since the U.S. Supreme Court has ruled in other contexts that the beliefs and practices of nonprofit institutions, even those connected with religious institutions, must be in accord with Federal public policy.

Because of the bill's narrow wording regarding exemptions, institutions that could be targeted by homosexual activists include summer camps for children, the Boy Scouts of America, Christian book stores, religious publishing houses, television and radio stations, and of course, any business with 15 or more employees.

The recently enacted Religious Freedom Restoration Act allows Government to override religious objections of the State can prove a compelling interest in doing so. The findings in this bill are designed to do just that. They can be cited as evidence in any number of gay rights cases, from gay marriage to gay adoption cases.

Now, you have heard stories of discrimination, but perhaps you should invite Brian Griggs to testify before you. He is a Seattle businessman. Recently, a former employer of Mr. Griggs filed a complaint of employment discrimination with the Seattle Human Rights Department, stating that Mr. Griggs had created a hostile work environment toward homosexuality. Mr. Griggs' crimes included playing conservative radio talk shows in his office that carried his firm's advertisements. He posted a letter from a congresswoman regarding his inquiry about her views on gays in the military. He also had a note on his desk, a personal note, concerning homosexuals and adoption of children.

The former employee, who was laid off with several other employees, volunteered for a time and then left the business of his own accord. He complained to the agency that he found Mr. Griggs' opinions objectionable, but he acknowledges that Mr. Griggs was not told any of this was objectionable at the time, nor that Mr. Dill was even a homosexual.

Having had to spend several thousand dollars defending himself, Mr. Griggs now knows first-hand what gay job discrimination laws mean to employers.

Another former Griggs employee, by the way, has filed an affidavit. He said that he is a gay man, and he never felt harassed in any way by Mr. Griggs' actions.

This is a freedom issue. Mr. Griggs cannot even play radio shows in his office, advertising his business, and they use gay rights laws to slam him for it. That is what we are talking about. We are talking about Government-enforced acceptance of homosexuality, homosexual-affirmative workplaces.

The bill does not contain quotas, either, or it specifically forbids quotas. But let us be honest—in civil rights legislation often, businesses have to resort to preferential hiring for Government-approved groups in order to prove that they do not discriminate. Quotas follow civil rights laws as surely as day follows night.

The wording of the bill is designed to accommodate much more than a few specifically-mentioned categories, as Mr. Broadus has pointed out. When you define orientation as real or perceived, you open up a Pandora's box for litigious groups. Under this bill, a

male employee could 1 day come to work in a dress and high heels, stating that this is now part of his identity. He is a transsexual, and he considers it part of his homosexual orientation.

I doubt that any of the Senators would allow this type of sexual orientation to be given free rein in their own staffs. Yet this bill, as we see it, would open you and every other employer of 15 or more people to harassing lawsuits.

This fits in well with the strategy advertised by homosexual activities. I am going to quote "After the Ball," by Marshall Kirk and Hunter Madsen, which is a candid blueprint for homosexual activism. "You get your foot in the door by being as similar as possible; then and only then, when your one, little difference is finally accepted, can you start dragging in your other peculiarities, one by one. You hammer in the wedge narrow end first. As the saying goes, allow the camel's nose beyond your tent, and his whole body will soon follow. The public should not be shocked and repelled by premature exposure to homosexual behavior itself. Instead, the imagery of sex should be downplayed, and the issue of gay rights reduced as far as possible to an abstract social question. In any campaign to win over the public, gays must be portrayed as victims in need of protection so that straights will be inclined by reflex to adopt the role of protector."

The authors go on and talk about how to smear religious people who have objections to homosexuality, using various means.

Now, when any civil rights law is passed, it is addressed not to episodic incidents of discrimination, but to whole classes. Homosexuals do not qualify for this kind of protection. In fact, in a recent article in "The Advocate," a national gay magazine, author Ed Micken said: "Today, it is rare that anyone gets fired just for being gay—the chief reason the Cracker Barrel Restaurant case was so sensational."

So we are talking about sweeping legislation that would affect most workplaces in America, and even the homosexual publications acknowledge it is really not a widespread problem. In fact, "The Advocate" just came out with a survey, and they said, "The majority of respondents said they are mostly or completely out of the closet, by far. This is 71 percent. Only 3 percent say they are definitely in the closet. At work, 44 percent have told their boss about their sexual orientation, and 26 percent just assume he or she knows. More than half say most or all of their coworkers know."

You combine this with economic data, with all due respect to Mr. Wellstone, and you do not find an oppressed group. You find survey after survey showing gays are far better off than the general population in terms of college degrees, discretionary income, frequent flyer miles— Virtually every indicator of luxury. Gays are doing just fine, thank you, economically.

What this whole debate is about is the central premise of whether homosexuality can be granted the same moral status as normal sexuality. We submit at the Family Research Council that all civil rights talk about granting homosexuals special protections rises or falls on this concept, and we reject the equation of homosexuality as some sort of flip side to heterosexuality. The literature is clear. The practices of homosexuality are well-documented in major medical journals, like "Journal of the American Medical Association,"

"British Medical Journal," "The Lancet," "American Journal of Public Health."

We are talking about behavior that has resulted in more than half the gay men in this country being HIV-positive. This is a tragedy that is unfolding, and the last thing you might want to do is encourage that kind of behavior. If you have compassion for people, you want to discourage this kind of behavior.

Employers are trying to get their employees to stop smoking. They know it is disruptive to their behavior. They are trying to get them to have fitness programs. Why would they be forced by the Federal Government to affirm a set of behaviors that is so disruptive, medically, that the books are full of it? This outrageous on the part of the Federal Government and represents an intrusion that, when the American people find out about it, will be outraged as well.

Senator KASSEBAUM. Thank you, Mr. Knight.

Mr. KNIGHT. Thank you.

[The prepared statement of Mr. Knight appears at the end of the hearing record.]

Senator KASSEBAUM. Ms. Feldblum, who is from the Georgetown University Law Center.

Ms. Feldblum.

Ms. FELDBLUM. Thank you, Senator Kassebaum. My name is Chai Feldblum. I am an associate professor of law at Georgetown University Law Center, where I direct the Federal Legislation Clinic and where I teach legislation, disability law, and sexual orientation and the law. And I am looking forward to testifying here today and specifically to respond to some of the concerns that you have just heard raised.

I am pleased to testify here today on behalf of the Leadership Conference on Civil Rights, which is the Nation's oldest, largest, and most broad-based coalition, and for 44 years, has been the legislative arm of the civil rights movement. As part of my work with the Leadership Conference, and as a legal consultant for the Human Rights Campaign Fund, I have worked on the issue of employment discrimination on the basis of sexual orientation and specifically on the Employment Non-Discrimination Act of 1994.

S. 2238, the Employment Non-Discrimination Act, is a critical piece of legislation. You have heard the compelling stories of discrimination of Ernest and Cheryl. You have heard Mr. Knight say that in fact, these are compelling stories.

Cheryl and Ernest are not alone. There are thousands of untold stories of discrimination on the basis of sexual orientation. The Employment Non-Discrimination Act will provide legal recourse for these individuals.

Congress appropriately passes anti-discrimination laws when there is a problem of discrimination against an identifiable group of people. That is the standard that Congress should use. That is the policy standard.

Evidence of such discrimination was evident in 1964, when Congress passed the Civil Rights Act of 1964. Evidence of such discrimination was evident in 1967, when Congress passed the Age Discrimination in Employment Act. And evidence of such discrimi-

nation was evident in 1990, when Congress passed the Americans with Disabilities Act.

Evidence of such discrimination on the basis of sexual orientation is present today.

Three lengthy appendices to my testimony document this. One appendix describes 50 cases of employment discrimination that have made it to the Federal courts and have resulted in judicial decisions. The second appendix lists 800 complaints that have been filed over the past 5 years, in 6 of the 8 States that currently have sexual orientation discrimination laws. And a third appendix lists and describes cases of personal discrimination that the Human Rights Campaign Fund has documented just over the past few months.

[The appendices referred to appear at the end of the hearing record.]

Ms. FELDBLUM. Mr. Knight just said, but in "The Advocate," a gay paper, the person says that today it is rare that anyone gets fired for being gay.

Do you know what that article is that he was quoting from? The article is someone responding to a question that was written in that asked, "Can I come out at work and be secure?" which is a question that a lot of gay people have.

And this person is writing back and saying, "The only sure-fire protection any of us has is self-confidence. But let me add that I have spoken with many lesbians and gay men who have come out on the job voluntarily, and few regret that choice. That does not mean they did not have to face some unpleasant circumstances, including discrimination or harassment. Yet all say that fears were worse than what they actually encountered and agreed that the benefits outweigh the liabilities."

Then he goes on to say, "Some employers have nondiscrimination policies, and it is important to try to get those." Then he says, "Today, it is rare that anyone gets fired just for being gay. Those who are putting up with harassment discrimination, such as thwarted promotions or an otherwise oppressive atmosphere, still have two powerful options—to raise hell—all employers hate publicity—or, perhaps more eloquent, just to leave. Get a better job at a place that appreciates you. They are out there."

This person is not saying that there is not discrimination against gay people. This person is saying what I say to people when they ask me: Can I be out at my job? I mean, they look at me—I am an "out" lesbian at Georgetown University Law Center—and they ask: Can I do that, too?

And I say to them: Quite honestly, I do not know. It depends on your employer. If you are going to work for Pacific Bell, then you can. If you work for Cracker Barrel, we know you cannot. And if you work for a lot of other employers, I do not know. There is no law out there that will protect you if you in fact do come out.

But I will also tell you that it is harmful to be silent. It is harmful to try to hide who you are, which is part of why I believe Senator Wellstone, as Jew, had the response he had, because Jews for so long have been told: Be silent, and you can get ahead.

So I say to people what this person says—you know, a lot of people do not get fired for being gay. I will tell you it probably might

affect your promotion abilities. I will tell you that you might have to deal with harassment like Ernest Dillon did. But it is worth it.

But it is more worth it to have a Federal law that says you cannot be fired from your job if you came out, just like you cannot be fired if you are a woman or a Jew or a black person or a person with a disability, or any number of the other characteristics that Congress has protected.

Employment discrimination on the basis of sexual orientation should be outlawed by Congress.

Let me respond directly to some of the contrary arguments that you have heard from my co-panelists. The first set of arguments essentially boils down to the claim that gay people do not really need protection.

The support for this claim, as Senator Wellstone quoted from Professor Broadus' testimony and also from Mr. Knight's written testimony, is that gay people are economically advantaged, that they are, as Professor Broadus said, "an elite group" that is not in need of protection from job discrimination; and as he said, look for the injury before you look for a remedy.

The evidence for that, as we just heard from Mr. Knight, is that gay people are more likely to have higher per capita annual incomes, are more likely to travel—it is the "frequent flyer" argument, as I call it—and are more likely to be college-educated.

There was one significant problem with his argument. It is the methodological flaw that Senator Wellstone referred to. The data does not support the assertion.

The main source used by both Mr. Knight and Professor Broadus is the Simmons report. I have the report here, which I would like to submit for the record, with all the striking statistics quoted by my co-panelists. Let me read to you an explanation of the report from the marketing company that produced it. The company explains that "This data describes readers of selected gay publications in various large cities." The company explains, "The information gathered by the Simmons organization was never intended and never claimed to represent the gay and lesbian community at large, but only the readers of the individual member publications. Just as a survey of the readers of' Newsweek," Forbes,' or' Redbook' are not representative of all Americans, the Simmons survey does not represent all members of the gay and lesbian community."

[The information referred to appears at the end of the hearing record.]

Ms. FELDBLUM. As Dr. Lee Badgett, an economist at the University of Maryland who has actually studied this issue, points out, "It is perfectly reasonable to survey a group of readers to determine the marketing potential of advertising in those publications. But common sense tells us those results will not accurately describe the overall group."

For example, she points out, "It would be inaccurate to take a description of the readers aimed at African Americans as an accurate description of all African Americans in the United States." In fact, Dr. Badgett points out, "In 1989, the same Simmons Research Group did a survey revealing that the readers of Ebony," Essence, and Jet magazines earned 41 to 82 percent more than the typical

African American"—not surprising, in terms of the group that would buy magazines.

I would like to submit for the record a study done by Dr. Lee Badgett and this explanation from the Simmons report. I would also like to submit for the record the results of a recent study conducted by Yankelovich Partners, described by "The New York Times" as probably the first nationally representative survey—that is, they used a larger sample for the survey—on the average earnings of gay and lesbian Americans. The Yankelovich survey found that incomes were basically the same, although gay men actually had lower incomes than heterosexual men in two categories.

[The documents referred to appear at the end of the hearing record.]

Ms. FELDBLUM. So the data presented by my two co-panelists do not support their assertions that gay people represent an elite and privileged group not in need of employment discrimination. Again, I think anyone who heard Cheryl Summerville will know that she is not a member of an elite group. She is, as she told Senator Kennedy, "making a go of it" right now.

Discrimination is out there, alive and well. And you know, to be honest, despite your protestations to the contrary, I believe you do know that discrimination is out there. And that is why I think the second set of arguments essentially boils down to the claim that, well, perhaps there is discrimination against some gay men and lesbians, but that discrimination need not and in fact should not be outlawed. That is in essence the second set of claims—it need not and should not be outlawed.

This argument takes two forms. The first is what I call the comparison argument. You are seeing the comparison argument before you eyes right now—there are a number of African Americans in the back of the room who are wearing stickers that say, "There is no comparison."

The comparison argument is not valid for public policy decisionmaking on the part of Congress. The argument is that gay people, for example, have not suffered as much as African Americans and therefore do not deserve similar protection.

To try to create a hierarchy of oppression misses the point entirely. As the child of a Holocaust survivor, I would never say that the oppression that Jews face is the same as the oppression that women face. But that is irrelevant for Congress in deciding whether to pass, for example, employment anti-discrimination for Jews and women.

The question is: Do Jews, do women, face employment discrimination? If they do, based on a characteristic that is not relevant, Congress should, as it has, pass a law prohibiting such discrimination.

The relevant question is not who has suffered more among minorities. I would never want to answer that question. The relevant question for Congress is does discrimination exist. It does exist, and so it is appropriate for Congress to act.

The second form the argument takes is that gay people are not a real minority. Real minority groups, according to my co-panelists, have immutable, benign, nonbehavioral characteristics. Gay people,

by contrast, claim minority status based solely on behavior. That was Mr. Knight's first point, or one of his first point.

And the argument goes, this behavior is clearly not immutable, because there is no definitive scientific evidence that homosexuality is genetic, and many people overcome their homosexuality, as their written testimony talks about.

Even if it were true that one's sexual orientation were easily mutable—which I would like to address in a moment—the problem with this argument is that it is totally irrelevant for purposes of passage of a civil rights law. An individual's access to protection under a Federal civil rights law has never been tied to whether that individual could lose that characteristic. A Jew or a Muslim could convert to Christianity and thereby avoid discrimination on the part of an employer who wants to hire only Christian. But Title VII still protects people on the basis of religion.

The ability to suppress, to change, or to hide a particular characteristic such as one's religion has never been grounds for denying protection to that person based on that characteristic.

In any event, my co-panelists misrepresent the State of the science in their written testimony. It is true we do not know definitely at this point whether one's sexual orientation—and that is both homosexuality and heterosexuality—is determined by biology, by environmental circumstances, or both. I am not sure we will ever know. But all of the scientific and psychological research, including studies cited by my co-panelists in their written testimony, indicates that sexual orientation is probably fixed by the time a child reaches the age of 4. So even if it were conclusively shown that sexual orientation is just a product of environmental factors—a theory which, by the way, is under significant challenge—one's sexual orientation would still not be a conscious choice made by an adult.

Let me go back to the relevant question for this hearing: Is there a problem of employment discrimination against gay people in this country? The answer to that is yes. So let me go ahead with the second relevant question for this hearing: Is S. 2238 a reasoned and balanced approach to the problem of employment discrimination? The answer is yes.

The core of S. 2238 is found in section 3. That section states, in a simple and straightforward manner, that an employer may not use the fact of an individual's sexual orientation in making an employment decision. An employer may not treat an individual better or worse because that individual is a gay man, a lesbian, a bisexual, or a heterosexual—no better and no worse; just the same.

A lot of S. 2238 addresses what the bill does not do. You have heard already today the bill does not create a right to partner benefits, does not allow disparate impact claims, prohibits quotas or preferential treatment, and contains a broad religious exemption.

I would be happy to answer any technical legal questions you may have on any of these provisions.

Let me correct here, though, two apparent misreadings of the bill presented by my co-panelists, and I am sure that both of them will be relieved to hear that the bill in fact does not and will not result in some of the scenarios and hypotheticals that they anticipate.

First, the bill will not prohibit an employer from disciplining an employee for sexual acts, however bizarre or disruptive, I believe was the quote in Professor Broadus' testimony, on or off the job.

The bill would not, for example, prohibit a school from firing a faculty member implicated in a scandal with a same sex prostitute, or a grade school teacher implicated in sexual child abuse—the two examples presented by Professor Broadus in his written testimony—nor would it prevent the law firm from firing the person who engaged in some of the inappropriate sexual conduct he mentioned in his oral testimony.

The school or the law firm would just need to have a policy which it applies equally to gay and straight teachers. The law firm would just have to have a policy which it applies equally to gay and straight lawyers that requires dismissal of employees who engage in such activities. Nothing about that policy would violate S. 2238.

Now, as I understand it, Professor Broadus' concern stems from the definition of the term, "sexual orientation" in the law, which says that "sexual orientation is gay, lesbian, bisexual, or heterosexual orientation as manifested by statements, acts, associations, identity."

All that means is that to establish yourself as a member of the protected group, you can use any of those factors. So, for example, to establish that you are a heterosexual—let us say you were fired because you are a heterosexual—you either say, "I State that I am a heterosexual," which is orientation manifested by statements, or you say, "I engage in heterosexual acts." That brings you in under the definition. All that does is make you a member of the protected class.

It is just like the Americans with Disabilities Act, which is the bill I worked on for a number of years. There is a definition in the bill that establishes whether you are a person with a disability, and the person has to show that he or she meets that standard in order to be a member of the protected class. And once you are a member of the protected class, that does not mean that you get to do anything that you want on the job, whether it is connected to your disability, or it is connected to your sexual orientation. Under the ADA, you still have to be qualified for the job, you still have to abide by all workplace rules that are uniformly enforced. The same thing for a person who gets coverage under this bill. They still have to be qualified for the job. They still have to abide by uniformly-applied workplace rules, including rules that discipline and fire people for inappropriate sexual conduct.

Second, my co-panelists have tried to figure out every possible scenario as to why S. 2238 will ultimately result in quotas, will ultimately allow disparate impact claims, and will ultimately require preferential treatment. They really, really want to be able to say that this is a special rights bill. It is not. No matter which way you turn this bill, it is not.

Now, it is true that courts often interpret laws in an expansive manner. Both of my co-panelists say that in their written statements. But I will tell you as a professor of statutory interpretation—that is what I teach in my legislation course—it is difficult, no, nigh impossible, for a court to apply an expansive interpretation on a flat-out prohibition. There is a flat-out prohibition in this

bill against quotas. There is a flat-out prohibition against preferential treatment. There is a flat-out prohibition on disparate impact claims. Laws do not usually get clearer than that.

So the entire piece of NLRB section 8(a)1 is irrelevant because all the court said in NLRB v. Erie, the case in 1963 which is what Professor Broadus was referring to, was that you do not have to show intent when you coerce. You can have an effects test because that is already in the underlying law. This bill has eliminated disparate impact as an underlying basis, and so that other case is irrelevant.

To be honest, Senator Kassebaum, gay people have never sought quotas; they have never sought preferential treatment. We have sought equality. We have sought equal treatment. We have sought fairness.

It is time for Congress to pass the Employment Non-Discrimination Act of 1994. We look forward to your leadership.

I would be pleased to answer any questions. [Applause.]

[The prepared statement of Ms. Feldblum appears at the end of the hearing record.]

Senator KASSEBAUM. Thank you.

Let me ask a couple of questions. One, I certainly would agree that discrimination does exist. I am not sure that the remedy is S. 2238, but I think one can say that discrimination exists and still question the remedy. I would like to ask Mr. Broadus, because I thought he made an interesting point—and maybe, Ms. Feldblum, you would like to respond. You mentioned that the legislation prohibits discrimination based on behavior and that that is unique. I believe it is unique under civil rights law as far as making behavior a discriminatory practice. Is that what you were stating?

Mr. BROADUS. That is what I was stating. And I think it is very important—perhaps Professor Feldblum missed the point when reading what is prohibited by the statute—it is not just prohibited to treat gays and straights differently. The third paragraph of those prohibitions prohibits otherwise discriminating on the basis of sexual orientation. What that means is ever, at any place in the workplace, taking sexual orientation into consideration prior to making employment decisions. That is otherwise discriminating, and that does take those acts which manifest the orientation and provide for every act, without reference to whether it is on the job or away from the job. That phrase protects every act which serves as a manifestation of orientation.

Senator KASSEBAUM. Well, I am not a lawyer. I have two very articulate lawyers here in front of me. Ms. Feldblum, let me ask you what do you see as the potential consequences of discrimination legislation based on behavior?

Ms. FELDBLUM. I actually do not think it is unique in Federal civil rights law.

Senator KASSEBAUM. What else?

Ms. FELDBLUM. I will tell you why, and it is actually very much because of my experience growing up. I grew up as an Orthodox Jew. For Orthodox Jews, when I would say, "I am an Orthodox Jew," that meant that I did various things. It meant that I prayed three times a day. It meant that I kept kosher.

Senator KASSEBAUM. That is religion.

Ms. FELDBLUM. There were behaviors that were connected to my being an Orthodox Jew that the statement actually had no meaning apart from that. Again, I know Judaism better than other religions, but my sense is that it does not quite make sense to just pull out and say, we will protect you if you say you are a Jew, but if you need to leave early on Friday afternoon, or—the behaviors manifested by being a Jew, we cannot protect. It has never been that way in civil rights laws.

So this would not be unique and unusual. What civil rights laws have usually done is ask is there a characteristic that people as a group are being discriminated against for, and does that characteristic in fact have no relationship to their ability in this case, let us say, to do a job—because if that does exist, then it is appropriate for Congress to act. It is appropriate to have a remedy that says that would be illegal.

So I think that is not quite right to say that it is completely unique.

Is that responsive to your question?

Senator KASSEBAUM. Well, somewhat. I think when you get into characteristics of the Orthodox Jew, it is Judaism, though, as a religion that is protected. There are behavior practices of one kind or another—like a born-again Christian, I suppose, Christianity. There are certain behavioral characteristics that one could associate there. But this is a total discriminatory practice based on behavior. And I do believe that is unique. That is what I was asking you, and what you think the consequences of that may be.

Ms. FELDBLUM. I think it is important to look at whether it makes sense to allow employers to fire people because they are gay. I think that has to be the essential question.

There are clearly people—many people in this room—who believe that it is entirely appropriate for employers to be able to fire someone just because he or she is gay. You know, 70 percent of the American public when they are surveyed say they do not think so. They do not like gay people particularly, a lot of people in America; they do not really want their sons and daughters to be gay. A lot of them do not like their behaviors. But they think it is a wrong thing for people to be fired from their jobs. And that is really all that we are saying with this piece of legislation.

Senator KASSEBAUM. Mr. Broadus, I would like to ask you about the disparate impact claims. You say that even though they were not included in the bill, such cases could still be brought.

Mr. BROADUS. Oh, I think the statement is stronger than that. I think what this bill ends up doing is prohibiting the use of disparate treatment, as a very technical thing, prohibiting the use of disparate treatment as evidence in claims that resemble those under 703(k). That is as limited and specific as you can get. And the problem is that this is a remedial statute, and courts will read restrictions on it as narrowly as possible. Then they will turn to the coercion claim, which is separate statutorily from the discrimination claim, and read it broadly because it provides protection. And since the history of this wording has been to provide to effects claims, this provision will undoubtedly be interpreted consistent with that history.

And it is not one case, Senator, one case back in the 1960's, that this language has been required not to require intent; it is the entire train of cases over the history of this language. And this language inescapably provides for effects claims. It is the godfather of disparate impact analysis. You use this language, and with this language, you get quotas.

Senator KASSEBAUM. Well, I would guess Ms. Feldblum does not agree with you on that. Let me just say that I think for me, there have been some very interesting legal questions here. As I said in the beginning, we have to decide whether we can promote greater tolerance by encouraging litigation, and whether that should be the remedy. But whether this will tie us into knots and solve the problems that we want to see solved, I think is something that we have to debate.

So I very much appreciate the legal expertise that you both have brought, and thank you, Mr. Knight. I very much appreciate your willingness to come today.

[Additional statements and material submitted for the record follow:]

XEROX

July 26, 1994

The Honorable Edward M Kennedy
United States Senate
Washington, DC 20510

Dear Senator Kennedy

In April, 1990, Xerox revised its nondiscrimination policy to include the category of sexual orientation Discrimination of any form, against any employees, does not belong in our work environment

We view diversity awareness and acceptance as enablers to increased productivity We strive to create an atmosphere where all employees are encouraged to contribute to their fullest potential Fear of reprisals on the basis of sexual orientation only serves to undermine that goal

Enhancing our work environment to prohibit discrimination on the basis of sexual orientation has not added any financial cost to our organization Instead, we believe our philosophy and practice of valuing diversity brings financial benefits to the workplace by encouraging full and open participation by all employees

Accordingly, we are pleased to see your effort to enact federal legislation that will prohibit employment discrimination on the basis of sexual orientation From the vantage point of our experiences to end workplace discrimination and our understanding of the Employment Non-Discrimination Act of 1994, we offer our endorsement of this bill which is designed to ensure fair and equal treatment for all citizens on the job

Sincerely,

Paul A Allaire

The Honorable Edward M Kennedy
United States Senate
Washington, D.C. 20510

Microsoft

July 27, 1994

Dear Senator Kennedy:

Microsoft seeks to empower individuals to do the best possible job and to make a difference in the world. We have a strong commitment to encourage diversity in our workforce. We hire the best and brightest people, without regard to their race, color, sex, sexual orientation, religion, national origin, marital status, age, disability or veteran status

We commend you for your efforts and are pleased to endorse your Equal Employment Principles, which reflect our own corporate policies.

Sincerely,

William H. Neukom
Senior Vice President for Law and
Corporate Affairs

Jerre L. Stead
Chief Executive Officer
Executive Vice President AT&T

AT&T
Global Information
Solutions

700 South Patterson Boulevard
Dayton OH 45479-0001
513 445-7786
FAX 513 445-7042

Honorable Edward Kennedy
Chairman, Labor and Human Resources Committee
U.S. Senate
Washington, D.C. 20510

July 28, 1994

Dear Senator Kennedy,

I am writing to express my support of the Employment Non-Discrimination Act (ENDA) of 1994. Creating a globally diverse environment that is enriched by people of varied races, ethnic backgrounds, and lifestyles is not only my personal goal, but AT&T's goal as well.

I am very proud to be part of AT&T because our company has a long tradition of respecting diversity. Nearly two decades ago, AT&T established a policy that prohibits job discrimination on the basis of sexual orientation. This enabled AT&T to take a leadership role in welcoming people of diverse lifestyles.

As CEO of AT&T Global Information Solutions (AT&T GIS), I ensure our team continues to hire, train, promote, and pay our associates (employees) based on skills and performance, not on sexual orientation. AT&T GIS also has diversity champions whose key responsibilities revolve around extending and encouraging trust and respect among our associates.

In addition, our AT&T GIS senior management is implementing a diversity strategy that will ensure we maintain an environment where associates are free to realize their highest personal and professional aspirations without fear of discrimination. We realize that our company's ultimate goal--delighted customers--begins internally with delighted associates. Our company's only real sustainable competitive advantage is our people. I am proud to join a team, made up of bipartisan members of Congress and civil rights leaders, whose goal is to prohibit job discrimination on the basis of sexual orientation. It is critical that we work together to ensure individual rights and liberties are not compromised.

My very best regards,

Jerre Stead

Honeywell

Michael R. Bonsignore
Chairman and
Chief Executive Officer

Honeywell Inc
Honeywell Plaza
P.O. Box 524
Minneapolis, MN 55440-0524
612 951-2297

August 19, 1994

The Honorable Edward M. Kennedy
United States Senate
315 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

I am writing in support of your Equal Employment Principles and the Employment Non-Discrimination Act of 1994.

Our Honeywell diversity policy prohibits discrimination on the basis of sexual orientation. We believe such a position is right and just, and acknowledges the full spectrum of our human diversity. We wish you the best of luck with your legislative efforts in this regard.

Sincerely,

Borland

Office of the Chairman
Philippe Kahn

100 Borland Way
Scotts Valley, CA
95066-3249 USA
(408) 431-1805
Fax: (408) 431-4309

Testimony of Philippe Kahn

Good morning, Mr. Chairman, Senator Kassebaum, and distinguished members of the committee. My name is Philippe Kahn, and I am President, Chairman and CEO of Borland International, the world's leading supplier of databases and programming languages for personal computers.

I am here today, as one of many, to endorse the Employment Non-Discrimination Act of 1994.

Borland International was one of the first Silicon Valley companies to voluntarily adopt a company-wide policy barring discrimination based on sexual orientation—a policy which parallels, and in some ways surpasses, the

Employment Non-Discrimination Act. We adopted our policy not only out of a sense of basic fairness, but because it makes sound business sense.

As you probably know, the computer software industry is one of the most competitive in the world. In the technology business, it has been proven many times that falling one step behind can be fatal. Therefore, it is of tantamount importance that we attract and retain the most qualified individuals for each job. Borland's experience clearly demonstrates that a policy barring discrimination based on sexual orientation helps us do this. We want our employees to understand that they will be judged solely by their performance, and not the prejudice of others. We strongly believe that an employee's race, sex, religion, national origin, age, disability and/or sexual orientation MUST NOT ever be the basis for hiring, firing, promotion or compensation.

In the field of Computer Software, many of us – who might be fierce competitors in other ways – stand together on this policy. Other companies that have similar non-discrimination policies are Apple Computer, Digital Equipment, IBM, Lotus Development, Microsoft, Silicon Graphics, and Sun Microsystems.

Outside of our industry, the Wall Street Project has shown that 5.7 million employees of over 150 of America's leading corporations are already covered by non-discrimination policies which include sexual orientation. Examples of these companies include General Motors, AT&T, Mobil Oil, American Express, DuPont, Sears, Proctor and Gamble, J.C. Penny and R.J. Reynolds. And since 1990, the number of companies with such policies has tripled.

Mr. Chairman, Senator Kassebaum, Gentlemen: I am here today because I was distressed to learn that in 42 states, it is currently legal under federal law for an employer to fire a qualified employee because of his or her sexual orientation. This baffles me, since it is clear that the increased diversity provided to America's workforce by women, minorities and people with disabilities has made our nation stronger. I believe that what applied previously to other groups who experienced discrimination applies now to the situation with lesbians and gays. It is unfortunate that—as in the past—it will ultimately take the actions of the Federal Government before the majority of American businesses seriously address this issue.

Thus, we all need the Employment Non-Discrimination Act. This isn't just for lesbian and gay employees, it is for everyone. And it isn't just good business sense, it an affirmation of equal opportunity.

Thank you very much for your time. I welcome any questions you may have.

TESTIMONY OF RICHARD WOMACK, DIRECTOR
DEPARTMENT OF CIVIL RIGHTS, AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
BEFORE
THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES ON
S. 2238, EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

July 29, 1994

My name is Richard Womack and I am the Director of the AFL-CIO Department of Civil Rights. By resolution of our convention, the AFL-CIO has stated that the time is long past due for the passage of legislation such as S. 2238, the Employment Non-Discrimination Act prohibiting discrimination in employment because of one's sexual orientation. The AFL-CIO

is comprised of over 80 affiliated International Unions, which in turn represent over 14 million U.S. workers.

Historically the AFL-CIO has been a strong supporter of civil rights legislation prohibiting discrimination in many areas, including voting, housing, education and, of course, in employment. In fact, Title VII of the 1964 Civil Rights Act, prohibiting discrimination in employment because of race, sex, religion or national origin is there because of the insistence of then AFL-CIO President George Meany. There was no employment anti-discrimination title in that legislation to begin with, but the AFL-CIO demanded its inclusion in the Act.

It is a fundamental principle of the AFL-CIO that civil rights be extended to all citizens in a democratic society. Support of the Employment Non-Discrimination Act of 1994 is part of our commitment to that principle.

We believe that it is the responsibility of trade unions to guarantee that workers be judged on their work and not by irrelevant criteria that address their private lives. Dismissal, harassment and intimidation of workers for reasons unrelated to their job performance is an employer tactic well known to the labor movement.

We protest any actions taken against a worker solely on the basis of sexual orientation and we support legislation at all levels of government to guarantee the civil rights of all persons without regard to sexual orientation in public and private employment.

When an Arizona judge rules that "an employee is not wrongfully terminated if he is fired for being homosexual," then it is time to change the law.

If the law was changed then Cheryl Summerville might be able to get her job back. Summerville was a reliable and well-liked cook at Cracker Barrel restaurant near Atlanta. She is also a lesbian. But that company instituted a policy saying they would employ no person "whose sexual preferences fail to demonstrate normal heterosexual values." Cheryl was fired and her termination notice said why. "This employee is being terminated due to violation of company policy. She is gay."

It is time to stop this blatant workplace discrimination. Workers in all occupations have been fired, and continue to be fired, because they are gay or lesbian. In the workplace, the AFL-CIO believes people should be judged on their work, not their religious preference, not their race, not their national origin, not their gender. Discriminating or firing someone for those reasons is against the law. Workers should not live in fear of losing their jobs or being denied promotions because of their sexual orientation. That should also be against the law.

We congratulate Senators Kennedy and Chafee and the co-sponsors of S. 2238 for their leadership in introducing this legislation.

The proposed legislation is straightforward and consistent with anti-employment discrimination legislation which protects minorities, women, the disabled and the elderly. The bill also contains important provisions which prohibit quotas and preferential treatment, and does not require an employer to provide benefits for the same sex partner of an employee. This is something that many of our unions have collectively bargained for and they will continue to do so.

Again, we firmly support this legislation, believing that employment decisions should be made on the basis of an individual's ability to perform a job.

Recent polls have shown that three-fourths of the American people believe that there should not be this kind of discrimination in the work place. This kind of legislation is long overdue. Eight states and many localities have adopted this kind of legislation. It is time for the federal government to act.

We look forward to working with you to ensure that S. 2238 is passed by Congress, and signed by the President, granting legal protection from employment discrimination to persons who have been historically denied equal opportunity in the workplace. It bears repeating that this is a matter of fairness and simple justice.

Leadership Conference on Civil Rights

1629 "K" St., NW, Suite 1010
Washington, D.C. 20006
202/466-3311

LABOR UNION STATEMENT OF ENDORSEMENT
For The
EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

The labor movement has historically upheld the fundamental principle of civil rights for all citizens in a democratic society and has been a leader in fighting discrimination in America. Discrimination on the grounds of sexual orientation is like discrimination based on race, sex, or religion, in that people are not judged by their individual merits, but according to a private issue that is extraneous to their employment. Thus, it is appropriate that labor unions endorse the Employment Non-Discrimination Act of 1994 (ENDA), a measure designed to ensure equal rights in the workplace for all workers without regard to sexual orientation.

We applaud Senator Kennedy and the co-sponsors of S2238, for leading the Congress and the nation in introducing this measure which recognizes that an individual's sexual orientation bears no relationship to the individual's ability to contribute to the workplace; that historically, American society has tended to isolate and stigmatize gay men, lesbians and bisexuals; that a significant arena in which this discrimination takes place is the workplace; and that employment discrimination on the basis of sexual orientation violates the basic American values of equality and fairness.

Employment decisions should be made on the basis of an individual's ability to perform a job. Each year, thousands of Americans are denied employment opportunities because of their sexual orientation. This discrimination occurs in many forms as American workers are not hired, fired, do not receive job promotions, or deal with verbal and physical abuse from co-workers and supervisors simply because of their sexual orientation. All of these harassing actions and tactics which are unrelated to job performance and based upon prejudice and bigotry, are well known to the labor movement. We know that without legal protections, gay men, lesbians and bisexuals are more likely to be targeted for hate crimes, even in the workplace. We denounce harassment or violence against anyone because of her or his sexual orientation. Trade unions have long fought for the right of workers to be judged on their work and not by irrelevant criteria that addresses their private lives.

This historic measure, endorsed by the Leadership Conference on Civil Rights, extends the legal protections from employment discrimination to those who have historically been denied equal opportunity in the workplace. ENDA is a step in the right direction of providing equal opportunity for all Americans.

AFL-CIO
California Labor Federation, AFL-CIO
Department for Professional Employees, AFL-CIO
Industrial Union Department, AFL-CIO
San Francisco Labor Council, AFL-CIO
Coalition of Labor Union Women
International Ladies' Garment Workers Union
United Automobile, Aerospace and Agricultural Implement Workers of America
Service Employees International Union
Health Care Workers, Local 250 (SEIU)
American Federation of Teachers
United Steel Workers of America
Lesbian/Gay Labor Alliance
International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers
National Treasury Employees Union
Actors' Equity Association
Amalgamated Clothing and Textile Workers Union
The Newspaper Guild
International Association of Fire Fighters
Communications Workers of America
American State, County and Municipal Employees
Association of Flight Attendants

Department of Justice

STATEMENT OF
DEVAL PATRICK
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

Mr. Chairman and Members of the Committee, I am pleased to provide this testimony today on the problems addressed by S. 2238, the Employment Non-Discrimination Act of 1994.

On behalf of the President, I want to commend you, Mr. Chairman, your colleagues in the House, Mr. Frank and Mr. Studds, and your more than 130 cosponsors in both chambers, for introducing this bill. It is a serious and thoughtful approach to address the problem of discrimination against gay men and lesbians. Because the President strongly supports the principle of non-discrimination based on sexual orientation, he will sign into law legislation passed by Congress that prohibits discrimination in employment based on sexual orientation.

The President and his Administration have consistently supported the principle of non-discrimination in employment. All Americans should be able to find jobs, keep jobs and earn promotions based on their qualifications and the quality of their work, not on irrelevant characteristics. This has been a core value in this country for many years.

As you know, thirty years ago, Congress enacted the Civil Rights Act of 1964, including Title VII which prohibits discrimination in employment based on race, color, religion, sex and national origin. In 1967, the Age Discrimination in Employment Act was enacted to protect older Americans. Most recently, in 1990, Congress enacted the Americans with Disabilities Act to extend full civil rights protections to persons with disabilities. All of these are legislative markers

on the road to full and productive participation in our free society.

These laws reflect Congress' deepening understanding of the notion that characteristics such as race, religion, sex, age and disability have no relevance to the ability of an individual to perform required functions of a job. Quite often, unfortunately, prejudice and stereotypes held by some employers still limit a gay or lesbian person's ability to obtain and keep a job. But as the President said in Riga, Latvia, recently, "Freedom without tolerance is freedom unfulfilled." In that spirit, this Administration believes the principle of non-discrimination in employment should be extended to include sexual orientation. The Administration wants to work with Congress to enact such a bill to make this principle a reality.

Our Nation prides itself on embracing the principle that persons should be judged based on merit and ability, not on class, culture or other extraneous factors. Our civil rights laws reflect this principle. By allowing employment discrimination on the basis of sexual orientation, our society cheats itself out of the contributions of very able and talented individuals throughout the Nation. As the international market place becomes increasingly competitive, America does not have the luxury of wasting talent.

The Administration supports using the framework of Title VII to provide protections against discrimination based on sexual orientation. These well known standards -- covering the same employers, using the same standards, and providing the same enforcement mechanisms -- provide employers and employees with solid guidance on the law. S. 2238 takes this sound approach, building on 30 years of Title VII jurisprudence.

S. 2238 makes a number of exceptions to the basic Title VII provisions. The first is for instances of disparate impact. Disparate impact was first recognized as a basis for establishing a violation of Title VII by the U.S. Supreme Court in *Griggs v.*

Duke Power, 401 U.S. 424 (1971). In *Griggs*, the Court recognized that a facially neutral practice that appears fair in form but discriminatory in operation, and if not justified by business necessity, is prohibited by Title VII. The Civil Rights Act of 1991 amended Title VII to codify the disparate impact standard. S. 2238, however, explicitly excludes disparate impact as a method of proof in cases of discrimination on the basis of sexual orientation.

The President has always supported, and strongly respects, freedom of religion. The administration supports carefully crafted provisions to insure that civil rights laws do not unduly interfere with that freedom. Title VII excludes religious organizations from the prohibition from discrimination based upon religion. The Employment Non-Discrimination Act respects freedom of religion by providing a broad exemption for religious organizations, an exemption broader than in other employment discrimination laws.

The third distinction from Title VII pertains to benefits. Under Title VII, discrimination in the provision of employee benefits is prohibited. The Employment Non-Discrimination Act, by contrast, would not apply to the provision of employee benefits to an individual for the benefit of his or her partner.

The fourth exception is for members of the armed forces. Title VII does not apply to members of the armed forces. S. 2238 would not apply and would have absolutely no impact on uniformed military employment practices. The Administration agrees with this approach.

The President has consistently opposed the use of quotas in employment discrimination law and his position is no different here. In addition to the exceptions outlined above, S. 2238 explicitly prohibits the use of quotas. The Administration agrees that any bill addressing this issue should rule out the use of quotas.

The notion of providing antidiscrimination protection is not so novel as to be untested in the public and private sectors. Longstanding Federal employment policy prohibits discrimination based on non-job-related conduct, including discrimination based on sexual orientation. We know of nothing in that experience to suggest a loss or reduction in productive capacity or workplace goodwill. Eight states and over 80 local governments provide some form of protection. Indeed, 308 of your colleagues in the House and Senate have pledged not to discriminate in employment based on sexual orientation.

In the private sector, numerous companies such as General Motors, Miller Brewing Company, Citicorp, IBM, and AT&T have policies of non-discrimination based on sexual orientation. A number of these employers also provide the same degree of employee benefits to a person's partner, without regard to sexual orientation.

Until this year, Congress had not heard testimony on the issue of employment discrimination based on sexual orientation in nearly 15 years. I trust that over the course of these hearings you will hear from many witnesses who will document the problems faced by lesbians and gay men in employment, and that their testimony will build a useful and solid record on the problem of employment discrimination based on sexual orientation. Hearing that testimony should lead you to the same conclusion we have reached: that Congress should pass a bill to embody the principle against discrimination in employment based on sexual orientation.

Mr. Chairman, thank you for the opportunity to testify today. We expect to have some technical comments on the bill, which we would like to supply for the hearing record. Beyond that, we look forward to working with you and the Committee to eliminate employment discrimination based upon sexual orientation.

John H. Chafee

STATEMENT BY SENATOR JOHN H. CHAFEE
IN SUPPORT OF THE EMPLOYMENT NON-DISCRIMINATION ACT
SENATE LABOR & HUMAN RESOURCES COMMITTEE

July 29, 1994

Today the Senate Labor and Human Resources Committee considers the Employment Non-Discrimination Act (ENDA), a bill to prohibit job discrimination on the basis of sexual orientation. I joined in introducing this bill last month, and I am pleased that the Committee finds the bill worthy of discussion and action.

To my view, this is a matter of simple fairness and basic civil rights -- and frankly, common sense. It is my belief that every American should be judged by the quality of his or her work, and not by factors that are wholly unrelated to job performance. To do otherwise only hurts employers and employees alike.

After all, what do business owners look for in a prospective employee? It seems to me that when an employer is trying to fill a position, be it entry-level or upper management, he or she is looking for an individual who will get to the office or job site on time every day, show some initiative and some hustle, and work hard to come up with creative solutions to tough problems. These are the qualities that help make American workers among the most productive in the world.

Congress has already made it clear that certain factors -- among them gender, race, religion, sex, and national origin -- do not play a role in the above qualifications, and can't be used as the basis for discrimination against workers. Clearly, sexual orientation also is not related to those qualifications. Discriminating against men and women solely for reasons of sexual orientation is not fair. And it deprives the U.S. of the talents of a group of its citizens. Such discrimination doesn't make sense. And adding common sense to our employment laws is the point of this bill.

On July 13, our distinguished former colleague Barry Goldwater lent his voice in support of this legislation in an Op-Ed in the Washington Post. As always, his comments were concise and to the point. Discrimination against gays or lesbians is not only unfair, said the conservative senator from Arizona, but is also a waste of potentially valuable workers. Senator Goldwater noted that "there was no gay exemption in the right to 'life, liberty, and the pursuit of happiness' in the Declaration of Independence. Job discrimination against gays -- or anybody else -- is contrary to each of these founding principles." He went on to point out that "[j]ob discrimination excludes qualified individuals, lowers work-force productivity, and eventually hurts us all. Topping the new world order means attracting the best and creating a workplace environment where everyone can excel. Anything less makes us a second-rate nation. It's not just bad -- it's bad business."

Senator Goldwater has hit the nail on the head. Discrimination is contrary to our American principles, and only hobbles our efforts to keep the U.S. as productive as possible. Let's do what common sense demands: approve the Employment Non-Discrimination Act.

Barry Goldwater
P.O. BOX 1601
SCOTTSDALE, ARIZONA 85252

July 19, 1994

Dear Ted and Nancy:

I'm sorry I couldn't be there today for your hearing on the Employment Non-Discrimination Act of 1994, but I wanted to let you know personally of my strong and enthusiastic support for this important legislation. And just in case you haven't seen it, I've attached a copy of a recent article I wrote for the Washington Post which tells why I think this bill is so essential.

Employment discrimination based on sexual orientation is a real problem in our society. From coast to coast and throughout the heartland, regular hard-working Americans are being denied the right to roll up their sleeves and earn a living. That is just plain wrong.

In my own state of Arizona, we had a young man named Jeff Blain who worked hard and was well-liked by his supervisors. In fact, he was doing such a good job, they raised his salary by 1/3! Then one day his supervisor found out he was gay, so they fired him. Pretty obvious discrimination - and open and shut case. Wrong! When the man tried to sue, the judge instructed the jury that "an employee is not wrongfully terminated if he is fired for being homosexual."

There's the rub. Most Americans don't realize that there's no federal law protecting qualified and competent Americans from being fired or refused a job solely because of

their sexual orientation. And while 8 states and over 100 municipalities now provide gays and lesbians the same civil rights in employment provided to other Americans, that still leaves almost 80% of the country with no protection at all.

That's why it's so important for the Labor Committee, and the entire Senate, to stand up and do what's right.

You don't have to look very far to see that there's a lot of support out there for this kind of legislation. In 1992, I worked with a broad-based bi-partisan coalition to pass an ordinance prohibiting job discrimination based on sexual orientation here in Phoenix. We had the support of the civil rights, religious, and business communities. Even large companies like US West were on our side.

In spite of this wide support, some people said the world would end if the ordinance passed. But it didn't. Phoenix businesses haven't collapsed -- in fact they haven't suffered one bit as a result. And that shouldn't be surprising. In states that have laws protecting guys and lesbians from job discrimination, officials report less than a 5% increase in job discrimination claims. As US West put it, this kind of legislation presents no danger to firms who don't discriminate.

Our own experience in Tucson, bears this out. 14 years ago, Tucson's Republican mayor helped pass an ordinance protecting gays and lesbians in employment. According to the city manager's office, the ordinance "has had no negative impact on the business community at all." 14 years and NO IMPACT – imagine that.

So you can see, there's no cost to business, and it's the right thing to do. It doesn't just make dollars, it makes sense.

That's why such a broad-based coalition is endorsing the Employment Non-Discrimination Act today. Support has come from the Leadership Conference on Civil Rights, Bishop Browning of the Episcopal Church of America, Rabbi Schindler of the Union of American Hebrew Congregations, the Evangelical Lutheran Church of America, Dr. Paul Sherry of the United Church of Christ, the NAACP, the Japanese American Citizens League, the AFL-CIO, AFSME, and SEIU. Anyone who can assemble that impressive of a group has to be doing something right.

I recall the words of Phoenix's own Rev. William O. Smith of the Shadow Rock Congregation. He may not be as famous as all those other folks, but he wrote a pretty stirring letter in support of Phoenix's ordinance two years ago which I want to share with you. In it he says: "To disagree with one lifestyle, religious persuasion or political view is the right of us all, but to deny civil, equal and human rights of anyone or any group destroys a little bit of the humanity of each of us."

I urge my former colleagues, both Republican and Democrat, to join me in supporting this much-needed legislation.

I pledge to do all I can to assist you in its swift enactment – for my children, my grandchildren, and yours.

Barry Goldwater

Barry Goldwater

A16 WEDNESDAY, JULY 13, 1994

The Washington Post

Barry Goldwater

Job Protection For Gays

Last year, many who opposed lifting the ban on gays in the military gave up service to the American ideal that employment opportunities should be based on skill and performance. It's just that the military is different, they said. In civilian life, they'd never condone discrimination.

Well, now's their chance to put up or shut up.

A bipartisan coalition in Congress has proposed legislation to protect gays against job discrimination. Congress is waking up to a reality already recognized by a host of Fortune 500 companies, including AT&T, Marriott and General Motors. These businesses have adopted policies prohibiting discrimination based on sexual orientation because they realize that their employees are their most important asset.

America is now engaged in a battle to reduce the deficit and to compete

"There was no gay exemption in the right to 'life, liberty, and the pursuit of happiness.'"

in a global economy. Job discrimination excludes qualified individuals, lowers work-force productivity and eventually hurts us all. Topping the new world order means attracting the best and creating a workplace environment where everyone can excel. Anything less makes us a second-rate nation. It's not just bad—it's bad business.

But job discrimination against gays and lesbians is real, and it happens every day. Cracker Barrel, a national restaurant chain, adopted a policy of blatant discrimination against employees suspected of being gay. Would anyone tolerate policies prohibiting the hiring of African Americans, Hispanics or women?

Today, in corporate suites and factory warehouses, qualified people live in fear of losing their livelihood for reasons that have nothing to do with ability. In urban and rural communities, hatred and fear force good people from productive employment to the public dole—wasting their talents and the taxpayers' money.

Gays and lesbians are a part of every American family. They should not be shortchanged in their efforts to better their lives and serve their communities. As President Clinton likes to say, "If you work hard and play by the rules, you'll be rewarded"—and not with a pink slip just for being gay.

It's time America realized that there was no gay exemption in the right to "life, liberty, and the pursuit of happiness" in the Declaration of Independence. Job discrimination against gays—or anybody else—is contrary to each of these founding principles.

Some will try to paint this as a liberal or religious issue. I am a conservative Republican, but I believe in democracy and the separation of church and state. The conservative movement is founded on the simple tenet that people have the right to live life as they please, as long as they don't hurt anyone else in the process. No one has ever shown me how being gay or lesbian harms anyone else. Even the 1992 Republican platform affirms the principle that "bigotry has no place in our society."

I am proud that the Republican Party has always stood for individual rights and liberties. The positive role of limited government has always been the defense of these fundamental principles. Our party has led the way in the fight for freedom and a free-market economy, a society where competition and the Constitution matter—and sexual orientation shouldn't.

Now some in our ranks want to extinguish this torch. The radical right has nearly ruined our party. Its members do not care enough about the Constitution, and they are the ones making all the noise. The party faithful must not let it happen. Anybody who cares about real moral values understands that this isn't about granting special rights—it's about protecting basic rights.

It is for this reason that more than 100 mayors and governors, Republicans and Democrats, have signed laws and issued orders protecting gays and lesbians. In fact, nearly half the states have provided some form of protection to gays in employment. But of course many others have not, including my own state of Arizona.

It's not going to be easy getting Congress to provide job protection for gays. I know that firsthand. The right wing will rant and rave that the sky is falling. They've said that before—and we're still here. Constitutional conservatives know that doing the right thing takes guts and foresight, but that's why we're elected, to make tough decisions that stand the test of time.

My former colleagues have a chance to stand with civil rights leaders, the business community and the 74 percent of Americans who polls show favor protecting gays and lesbians from job discrimination. With their vote they can help strengthen the American work ethic and support the principles of the Constitution.

The writer, a former senator from Arizona, was the Republican nominee for president in 1964

WASHINGTON OFFICE
OF THE EPISCOPAL CHURCH
110 Maryland Avenue, NE, Suite 309, Washington, DC 20002
Telephone: (202) 547-7300 1-800-228-0515

**Statement of The Most Rev. Edmond L. Browning,
Presiding Bishop, The Episcopal Church,
On Behalf of the
Employment Non-Discrimination Act
July 19, 1994**

On behalf of the Episcopal Church, I am proud and pleased to join with so many distinguished figures in the religious and civil rights communities in enthusiastic endorsement of S. 2238, the Employment Non-Discrimination Act of 1994. I offer my thanks to Senator Kennedy, an unwavering champion of civil rights for all Americans, for the opportunity to join with him today on behalf of this legislation. I am happy, also, to acknowledge the co-leading role of a devoted Episcopalian and good friend to our Church's public ministry, Senator Chafee, in bringing forth this landmark bill.

Since 1976, the Episcopal Church has been committed publicly to the notion of guaranteeing equal protection for all citizens, including homosexual persons, under the law. In that year, the General Convention of the Episcopal Church adopted Resolution A-71, expressing its conviction that homosexual persons are entitled to equal protection of the laws with all other citizens and calling upon society to ensure that such protection be provided in actuality. The Employment Non-Discrimination Act of 1994 explicitly fulfills that mandate, and I urge Members of Congress to move swiftly to pass the bill, and the President to sign it into law.

My warm embrace of this legislation, of course, reflects more than my standing as Presiding Bishop of the Episcopal Church. It represents my deep, personal belief in the instrinsic dignity of all God's children. That dignity demands that all citizens have a full and equal claim upon the promise of the American ideal, which includes equal civil rights protection against unfair employment discrimination. For far too long, our civil rights laws looked the other way with respect to

discrimination based on race, gender, religion, national origin, age, and disability. Fighting to right those wrongs taught us that the cause of civil rights protection for one is the cause of such protection for all. Today, so long as some of us remain subject to employment discrimination on the basis of sexual orientation, our system of civil rights protection for all Americans remains an unfulfilled ideal. The long overdue protection embodied in this legislation brings that ideal one significant step closer to reality.

REMARKS BY CORETTA SCOTT KING
PRESS CONFERENCE ON THE INTRODUCTION
OF THE
EMPLOYMENT NON-DISCRIMINATION OF 1994
WASHINGTON DC
JUNE 23, 1994

THANK YOU FOR YOUR GRACIOUS INTRODUCTION. AND I WANT TO THANK ALL OF THE MEMBERS OF THE PRESS FOR JOINING US TODAY FOR THIS IMPORTANT PRESS CONFERENCE ON THE EMPLOYMENT NON-DISCRIMINATION OF 1994.

SENATOR CHAFEE, SENATOR KENNEDY, REPRESENTATIVES EDWARDS, FRANK, STUDDS AND MORELLA, DISTINGUISHED GUESTS , MEMBERS OF THE PRESS, TODAY I AM PROUD TO JOIN IN SUPPORTING THIS MUCH-NEEDED LEGISLATION, WHICH WOULD PROVIDE SOME LONG-OVERDUE PROTECTION TO AMERICAN WORKERS FROM THE INJUSTICE OF DISCRIMINATION BASED ON SEXUAL ORIENTATION.

I SUPPORT THIS LEGISLATION BECAUSE LESBIAN AND GAY PEOPLE ARE A PERMANENT PART OF THE AMERICAN WORKFORCE, WHO CURRENTLY HAVE NO PROTECTION FROM THE ARBITRARY ABUSE OF THEIR RIGHTS ON THE JOB. FOR TOO LONG, OUR NATIONAL HAS TOLERATED THE INSIDIOUS FORM OF DISCRIMINATION AGAINST THIS GROUP OF AMERICANS, WHO HAVE WORKED AS HARD AS ANY OTHER GROUP, PAID THEIR TAXES LIKE EVERYONE ELSE, AND YET HAVE BEEN DENIED EQUAL PROTECTION UNDER THE LAW.

BY INCLUDING VICTIMS OF DISCRIMINATION BASED ON SEXUAL ORIENTATION, THIS BILL WOULD DO MUCH TO RECTIFY THIS INJUSTICE IN

THE WORKPLACES OF AMERICA. I AM MUCH ENCOURAGED THAT A RECENT NEWSWEEK OPINION POLL FOUND THAT 74 PERCENT OF THE RESPONDENTS FAVORED PROTECTING GAY AND LESBIAN PEOPLE FROM JOB DISCRIMINATION, AND I AM PROUD TO STAND WITH THIS OVERWHELMING MAJORITY OF AMERICANS WHO RECOGNIZE THE JUSTICE OF THIS CAUSE.

THIS BILL WOULD GRANT THE SAME RIGHTS TO VICTIMS OF DISCRIMINATION BASED ON SEXUAL ORIENTATION THAT ARE EXTENDED TO VICTIMS OF RACIAL, GENDER AND RELIGIOUS DISCRIMINATION AND THOSE WHO HAVE BEEN UNFAIRLY TREATED IN THE WORKPLACE BECAUSE OF THEIR AGE, ETHNICITY OR DISABILITY. THE BILL PROVIDES NO PREFERENTIAL TREATMENT OR SPECIAL RIGHTS THAT HAVE BEEN DENIED THESE GROUPS.

I SUPPORT THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994 BECAUSE I BELIEVE THAT FREEDOM AND JUSTICE CANNOT BE PARCELED OUT IN PIECES TO SUIT POLITICAL CONVENIENCE. AS MY HUSBAND, MARTIN LUTHER KING, JR. SAID, "INJUSTICE ANYWHERE IS A THREAT TO JUSTICE EVERYWHERE." ON ANOTHER OCCASION HE SAID, "I HAVE WORKED TOO LONG AND HARD AGAINST SEGREGATED PUBLIC ACCOMMODATIONS TO END UP SEGREGATING MY MORAL CONCERN. JUSTICE IS INDIVISIBLE." LIKE MARTIN, I DON'T BELIEVE YOU CAN STAND FOR FREEDOM FOR ONE GROUP OF PEOPLE AND DENY IT TO OTHERS.

SO I SEE THIS BILL AS A STEP FORWARD FOR FREEDOM AND HUMAN RIGHTS IN OUR COUNTRY AND A LOGICAL EXTENSION OF THE BILL OF RIGHTS AND THE CIVIL RIGHTS REFORMS OF THE 1950 AND 60S.

THE GREAT PROMISE OF AMERICAN DEMOCRACY IS THAT NO GROUP OF PEOPLE WILL BE FORCED TO SUFFER DISCRIMINATION AND INJUSTICE. I BELIEVE THAT THIS LEGISLATION WILL PROVIDE PROTECTION TO A LARGE GROUP OF WORKING PEOPLE, WHO HAVE SUFFERED PERSECUTION AND DISCRIMINATION FOR MANY YEARS. TO THIS ENDEAVOR, I PLEDGE MY WHOLEHEARTED SUPPORT.

STATEMENT OF

THE HONORABLE MARY FRANCES BERRY, CHAIRPERSON

U.S. COMMISSION ON CIVIL RIGHTS

BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

July 19, 1994

Mr. Chairman and members of the Committee, I am pleased that I was invited to testify today on S. 2238, the Employment Non-Discrimination Act of 1994 (ENDA).

As an independent, bipartisan, factfinding agency of the Federal Government, the Commission is mandated to collect, study and publish information concerning the denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or the administration of justice. The Commission reports its findings and recommendations to the President and the Congress.

Congress has not included issues relating to the denial of equal protection because of sexual orientation in the Commission's jurisdiction. With respect to equal protection in the administration of justice, however, the Commission does regard issues concerning sexual orientation as within its jurisdiction. Thus, in 1977, the Commission concluded that it could investigate the "disparate treatment of *any class* of persons by law enforcement, corrections, probation and parole, and the courts, both civil and criminal." (Commission statement, August 15, 1977.)

The Commission is composed of eight members, representing a diverse range of backgrounds, views and talents. My collegues include: Vice Chairperson Cruz Reynoso, Professor of Law at the UCLA Law School; Carl A. Anderson, Vice President for Public Policy with the Knights of Columbus and Dean, North American Campus of the Pontifical John Paul II Institute for Studies on Marriage and Family; Arthur A. Fletcher, Distinguished Professor of Business Administration and Director of the International Institute for Corporate Social Policy at the University of Denver; Robert P. George, Associate Professor of Politics at Princeton University; Constance Horner, Guest Scholar in Governmental Studies, Brookings Institution; Russell G. Redenbaugh, Partner and Director of Cooke & Bieler, Inc., and Chairman and CEO of Action Technologies, Inc.; and Charles Pei Wang, Secretary, United Way of New York City.

Because of the Commission's independent status, I should note that my remarks do not necessarily reflect the views of the Administration.

While the Commission does not have a position on the Employment Non-Discrimination Act of 1994, the Commission has long been concerned about the broad issue of employment discrimination. As I'm sure you know, the Commission is committed to ensuring equal employment opportunity for all Americans. Under the overall rubric of employment discrimination the Commission has conducted numerous studies over the years. Our studies have examined such diverse topics as the enforcement of equal employment opportunity laws (1975, 1987, 1993), fair employment issues facing Asian Americans (1992) and Latinos in the District of Columbia (1993), employment discrimination arising from the Immigration Reform and Control Act of 1986 (1989), equal employment opportunity in the Federal workforce (1993), and the application of civil rights laws to Congress (1980). Additionally, in our past studies on the topic of the administration of justice, we have addressed the concerns of individuals who have alleged police brutality due to their sexual orientation.

Discrimination that arises from prejudice, bigotry, or pure ignorance against any member of society, irrespective of the domain affected, is unjust and harmful to the directly affected individual and it undermines the social, economic and political strength of our Nation. Denial of equal access to employment and economic opportunities is perhaps the most destructive and invidious form of discrimination. Those who are immediately affected are denied the opportunity to realize their full economic and social potential, and such discrimination erodes an individual's sense of self-worth and participation in the community at-large. Discrimination hurts everyone in society by sapping the productive power of its collective human resources and the strength that comes from unity and common purpose. As the United States struggles to compete in the global economy, we cannot afford to waste the talents and potential contributions of such a large segment of our population. It is not right and it is not smart.

This Nation has made great strides in enacting laws that prohibit discrimination based on color, race, religion, sex, age, disability, and national origin. The Federal civil rights and equal opportunity laws are designed to eliminate arbitrary and discriminatory barriers. Although Federal civil rights law relating to employment has evolved since the 19th century, the first major statutes were not enacted until the 1960s, when Congress passed the Equal Pay Act (1963), the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1967, among other important civil rights laws. These statutes prohibited discrimination based on race, color, religion, sex, national origin, and age. The Rehabilitation Act of 1973 extended limited protection from employment discrimination to disabled persons in federally assisted programs and the Federal Government. However, it was not until 1990, with passage of the Americans with Disabilities Act, that persons with mental and physical disabilities gained full and comprehensive coverage in employment and other areas.

Since 1979, bills have been introduced in Congress to extend civil rights protections to gay men, lesbians, and bisexuals but none of these bills has been enacted. Representative Ted Weiss spoke to this situation in March 1991 when he introduced the Civil Rights Amendments Act of 1991. He stated:

> [O]ne of the most fundamental responsibilities of any democratic government is safeguarding the liberties of its citizens. By historically denying civil rights protections to gay men and lesbians, our Government shamefully has neglected that responsibility to an estimated 25 million Americans. To this day, there exist no Federal laws and no legal recourse to protect this minority when they encounter discrimination based on their private lifestyle ....

In order to establish comprehensive and consistent protection for the United States workforce against employment discrimination based on sexual orientation, I believe that a Federal statute, such as ENDA, needs to be enacted. ENDA would establish a uniform set of rights and remedies and would bring to bear the Federal enforcement system of the Equal Employment Opportunity Commission.

This bill does not create special protections or preferences for gay people. The drafters of ENDA have addressed the concerns of religious groups, the military, and others who have expressed reservations about protecting gay men, lesbians, and bisexuals from employment discrimination.

ENDA requires that in hiring, promotion, and in other employment decisions, all workers will be treated equally, without regard to their sexual orientation or the sexual orientation of people with whom they associate. As does Title VII, ENDA would apply to employers, employment agencies, and labor organizations, including Federal, State, and local governments and the United States Congress. The EEOC would have the same powers to enforce

the law as it does under Title VII, the Americans with Disabilities Act and other equal employment statutes. In addition to discriminatory acts, the bill prohibits retaliation and coercion against individuals in reaction to or as a result of enforcing the act's provision.

We note that ENDA does not require employers to extend employee benefits to an employee's partner. ENDA also exempts from coverage the military and, as does Title VII, most religious organizations. It bars the use of disparate impact analysis to establish a prima facie violation of the act, as is permitted for other protected classes under Title VII, and expressly prohibits employers from adopting quotas or giving individuals preferantial treatment on the basis of sexual orientation. ENDA makes the Federal Government liable for all remedies under the act.

Discrimination against homosexuals is a reality of American life today. According to preliminary data for 1993 collected by the FBI pursuant to the Hate Crimes Statistics Act, approximately 12 percent of the reported crimes were motivated by sexual orientation bias. In seven (7) of the states with laws prohibiting discrimination on the basis of sexual orientation, civil rights enforcement officials report that the vast majority of the complaints stem from allegations of discrimination in employment. A survey of these states showed that 76 percent of the cases filed since their laws took effect involved employment.

Statistical and case study evidence reviewed by Commission staff shows that the problem of sexual orientation discrimination in employment is widespread and, in many instances, egregious. It affects individuals across a wide spectrum of occupations, socioeconomic levels, and geographic locations.

A survey conducted by the American Association of Physicians for Human Rights reported that 17 percent of lesbian, gay, and bisexual physicians were refused medical privileges, fired or denied employment, educational opportunities, or a promotion because of their sexual orientation. The Los Angeles County Bar Association Committee on Sexual Orientation Bias issued a report in June 1994, with the following findings: one in seven attorneys reported that his or her employer engaged in some form of anti-gay discrimination in the recruitment and hiring of attorneys; over half believe that their work environment is less hospitable to gay attorneys than to heterosexual attorneys; and gay attorneys are less likely to become law firm partners. A 1992 review of 21 non-random surveys of self-identified lesbians, gay men, and bisexuals found that between 16 percent and 46 percent of survey respondents reported having experienced some form of discrimination in employment--in hiring, promotion, firing, or harassment.

Available statistics underrepresent the actual incidence of discrimination based on sexual orientation. In many instances, gay men, lesbians and bisexuals have gone to great lengths to prevent their employers and coworkers from learning about their sexual orientation. The fear of discovery or retaliation if they file a complaint has been cited in many accounts as a primary reason that these individuals are reluctant to report discriminatory acts, even in jurisdictions that prohibit such acts.

Further, there is a perception that gay men and lesbians do not suffer economically and, perhaps, may do better than their heterosexual counterparts. But the facts paint a very different picture. The study by the Los Angeles County Bar Association shows that among heterosexual lawyers with 10 or more years in practice, 41 percent earn over $125,000 per year and only 25 percent earn under $75,000, while among their gay peers, the numbers are almost reversed, with only 27 percent earning over $125,000, but 44 percent earning under $75,000. A recent study used a random sample from the United States population to compare gay and bisexual individuals with heterosexuals having the same race, sex, education, experiance, geographic location and occupation. In that study by Dr. Lee Badgett, gay and bisexual

men earned 11 percent to 27 percent less than otherwise similarly situated heterosexual men. Lesbian and bisexual women in this sample earned from 5 percent to 14 percent less than heterosexual women.

As is true of the evolution of civil rights and equal opportunity laws, attitudes of the American public on discrimination in employment based on sexual orientation have changed greatly in recent years. According to Gallup Poll data, in 1977, 56 percent of those polled believed that homosexuals should have equal rights in terms of job opportunities. In 1982, the number had risen to 59 percent. By 1989, 71 percent said they should have equal rights to job opportunities. In 1992, according to Gallup, the figure was 74 percent, and in 1993, the positive response was 80 percent. A poll by *Newsweek* in 1992 showed 78 percent of those questioned said homosexuals should have equal rights in employment opportunities. A 1993 *New York Times/CBS* poll showed that 78 percent of those polled also thought gay men and lesbians should have equal employment opportunities.

As the above data indicates, there has been a dramatic shift in public opinion in the last 5 years in favor of eliminating employment discrimination based on sexual orientation. This has been reflected at the State and local level with the enactment of a variety of legal prohibitions on discrimination based on sexual orientation. Eight states have passed laws. Wisconsin, in 1982, was the first and Massachusetts was the second in 1989. Connecticut and Hawaii passed laws in 1991; California, New Jersey, and Vermont in 1992; and Minnesota in 1993. In addition, there are at least 18 States that have issued Executive Orders barring discrimination, based on sexual orientation, primarily in public employment. At least 87 cities or counties have civil rights ordinances banning such discrimination, and at least 39 cities or counties have issued council or mayoral proclamations banning sexual orientation discrimination in public accommodation.

In the eight (8) States with laws that bar sexual orientation discrimination, both public and private employment are covered. There are however some differences in other areas of coverage. For example, Massachusetts, Connecticut, Wisconsin, and Vermont also bar discrimination based on sexual orientation in public accommodations, education, housing, credit, and union practices. Other State's coverage is much more limited. Hawaii only covers public and private employment. California does not cover housing, credit and union practices.

City and county ordinances are even more diverse in their coverage. Most cover public employment. Many do not cover private employment. Enforcement, as would be expected, is also uneven. Most jurisdictions did not provide for additional funding for enforcement of the laws, Executive Orders, or local ordinances. Most have indicated that this was not necessary because of the relatively small number of complaints filed based on sexual orientation discrimination. Less than 5 percent of the complaints filed in the eight (8) States are on this basis. In 1993, for example, only 2 percent of the complaints filed with the Massachusetts Commission Against Discrimination involved employment discrimination based on sexual orientation. In Wisconsin, the State with the oldest such statute, the number was only 1.1 percent. There is a concern, however, that despite the legal protections provided in these eight (8) States, instances of sexual orientation discrimination in employment are significantly underreported.

In addition to State and local government action, many corporations have adopted policies prohibiting employment discrimination based on sexual orientation. For example, over 25 percent of the Fortune 1000 companies have adopted such policies. It should also be noted that the AFL-CIO has endorsed ENDA.

Despite the initiatives of State and local governments and corporations to bar sexual orientation discrimination, the majority of gay men and lesbians do not have any legal or

administrative protections in this area. Further, in the jurisdictions where there are legal bars to this type of discrimination, there are only limited protections in terms of rights and/or available remedies.

I believe that each and every worker in America should be judged solely on the basis of his or her abilities and job performance. People should not be prevented from having productive and responsible careers for irrelevant reasons. Invidious discrimination in employment is harmful to the individual and to society as a whole.

The Employment Non-Discrimination Act of 1994 is designed to deal with the serious discrimination being experienced by gay men, lesbians, and bisexuals, and will advance the cause of equality of economic opportunity.

Mr. Chairman, this concludes my prepared statement. I will be pleased to answer any questions you might have.

NATIONAL COMMISSION FOR EMPLOYMENT POLICY
1441 L Street, N.W., Suite 9000
Washington, D.C. 20005-3512

(202) 724-1545
(202) 724-0019 Fax No.

Statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy, Submitted to the Senate Labor and Human Resources Committee, In Support of S. 2238, The Employment Non-Discrimination Act of 1994 (ENDA)

Mr. Chair, thank you for the opportunity to submit this statement for the record in support of S. 2238, the Employment Non-Discrimination Act of 1994 (ENDA), a bill that, if enacted, would extend federal protection against discrimination to employment decisions based on sexual orientation. As Chair of the National Commission for Employment Policy (NCEP) -- an independent federal agency charged with advising both Congress and the President on employment issues -- it is my role to convey the Committee and to the American people, that employment discrimination in any form is invidious, costly and counterproductive. The goal of the federal government should be to enhance the individual dignity and opportunities of all Americans in the workplace. Therefore, I submit this statement to lend the Commission's support for this legislation by making it abundantly clear that this bill is not about special rights or even Constitutional rights; what it is about is equal employment opportunity for all the workers of our nation.

Ample evidence of sexual orientation discrimination in the workplace is easily found. Surveys have shown that as many as 76 to 81 percent of gay men and lesbians conceal their

sexual orientation at work.[1] Sixty-six percent of Fortune 500 chief executives said in a 1987 Wall Street Journal poll that they would hesitate to give a management job to a homosexual person.[2] Between 16 and 44 percent of gays and lesbians questioned nationally said they have endured some form of discrimination in their employment.[3] According to one estimate, roughly 42,000 individuals are dismissed each year in this country on the basis of sexual orientation.[4]

This is not only an issue of what is morally right, but also relates directly to the economic viability of our country. As America approaches the 21st century, our need to be economically competitive is paramount. By the conservative estimate of one economist working for the Commission, the American economy may lose nearly $1.4 billion in work productivity stemming from sexual orientation discrimination concerns.[5] Additionally, she has found that employers bear significant costs -- approximately $47.4 million in total -- attendant to discharges based on sexual orientation discrimination.[6] In another study she found that sexual orientation discrimination manifests itself in reduced earnings for behaviorally gay, lesbian, and bisexual, full-time workers -- with gay/bisexual men earning from 11 to 27 percent less, and lesbian/bisexual women earning from 5 to 14 percent less than their heterosexual counterparts.[7] The obvious conclusion is that bigotry is expensive -- it is wasteful and foolish to harass, exclude and discriminate against qualified individuals.

Moreover, as President Clinton so aptly reminded the American people during the 1992 campaign, this country does not have a person to waste. The testimony presented below discusses the environment that gay, lesbian, and bisexual workers encounter in the workplace, and the attendant cost to our economy. It also addresses the urgent need for passage of ENDA.

Discrimination in the Workplace

The first matter that must be recognized in this dialogue is that discrimination against gays, lesbians, and bisexuals in this nation is rampant. Sexual orientation discrimination does exist. The debate on this proposed legislation should not be mired in the fallacious assertion that the federal government is creating a special right for a subgroup of the population. Nor is this a question of whether the equal protection clause of the U. S. Constitution applies to gays and lesbians. Rather the issue is whether gays and lesbians are entitled to a work environment free of discrimination and harassment.

Because homophobia is still widespread and the professional risks are great, the decision to be open at work about one's sexual identity involves a level of courage that is not required of other workers. For that reason, and because negative stereotypes are pervasive, many gay men, lesbians, and bisexual people choose to remain "invisible" in the workplace.[8] In fact, a 1992 survey of 1,400 gay men and lesbians in Philadelphia showed that 76 percent of the men and 81 percent of the women conceal their sexual orientation at work.[9] They do not "come out" publicly and acknowledge their sexual orientation for fear of discrimination, limiting their professional opportunities, or outright firing from their jobs. Adding to their stress is the fact that they may be out in other areas of their life, such as with friends and family; the process of needing to switch identities continually can be confusing and painful.[10]

Fears over "coming out" are reasonably based on attitudes prevalent within the business world, as well as on the experiences of gays and lesbians. According to a 1987 Wall Street Journal poll of Fortune 500 chief executives, 66 percent of the CEOs indicated that they would hesitate to give a management job to a homosexual person.[11] Another survey, conducted from 1987 to 1988 in Anchorage, Alaska, showed that approximately one out of every four employers said that they would either "not hire" or "not promote," and 18 percent would fire, someone they thought to be homosexual.[12]

Ample evidence of such discrimination across the nation was revealed in a report by the National Gay & Lesbian Task Force (NGLTF) Policy Institute. A review of twenty surveys conducted across this country between 1980 and 1991 showed that between 16 and 44 percent of gays and lesbians had faced some form of discrimination in employment.[13] A study conducted by the Gay and Lesbian Community Action Council (GLAC) for the Minneapolis-St. Paul area found that 11 percent of the gay and lesbian respondents indicated that they were threatened with job loss due to their sexual orientation; 7 percent had lost jobs; 5 percent felt that they had been denied employment; and 6 percent had been denied promotions.[14] Another recent survey undertaken in Kansas City by a commission established by Mayor Emanuel Cleaver showed that a full third of the gay and lesbian workers surveyed experienced discrimination.[15]

Moreover, by one calculation, using 1990 data and assuming a population of 5 percent of the workforce (which is a low-end figure and half of many estimates), an estimated 42,000 gays, lesbians and bisexuals are fired each year on the basis of their sexual orientation.[16]

The nature of discrimination seems to differ according to job category. White collar gay, lesbian, and bisexual workers tend to face a "lavender glass ceiling." Blue collar workers are more likely to be subjected to direct harassment from co-workers as well as find their chances for advancement limited.[17]

Gay and Lesbian Strategies in the Workplace and Their Impact

Unlike members of other protected classes, gay workers are camouflaged by gender and ethnicity. They have the option of whether or not to indicate their sexual orientation at work because of fear of harassment and discrimination, most have opted for silence.[18]

Traditionally, most gay workers have used two strategies at work: hiding their sexual orientation by pretending to be heterosexual and adopting avoidance practices to keep from revealing their homosexuality. More specifically, these involve hiding sexual identity by actively pretending to be heterosexual. To mislead people, some lesbian and gay workers assume a dual identity, inventing fictitious events about their private lives and attending organization functions with a member of the opposite sex.[19]

A second strategy is avoiding references to loved ones in order not to disclose sexual orientation. Less extreme and more frequently used than hiding, this strategy may be employed in degrees. At one end, a gay worker, invoking a value for privacy and a belief that discussing personal issues at work is unprofessional, will try to avoid the casual, social conversations that are a natural part of daily work life. Such a worker will appear to be "all business" and aloof. Others try to engage in social conversation, but are uncomfortable and evasive about the personal relationships (spouses, dates) and plans that form a large part of the casual conversation among people.[20]

These strategies take a toll on both the worker and the organization. Gay workers face the dilemma of whether to continue to protect themselves through lying or to come out at work and face possible consequences. Continual lying undermines self-respect. It alienates gay workers from their environment, heightens stress levels, and diminishes their effectiveness on the job because a great deal of energy, which could otherwise be applied to work, is channeled into hiding or avoiding disclosure of sexual identity.

As Barry Goldwater noted in a recent op-ed, it is clear that "[j]ob discrimination excludes qualified individuals, lowers work-force productivity and eventually hurts us all."[21]

The strategies discussed above result in a sizable decrease in productivity for organizations. Gay workers form an important segment of any organization. The cost of their giving anything less than their best effort is a negative impact on the bottom line. One rough, conservative calculation made by an economist working for the Commission estimates that this legislation could help the American economy realize an increase in productivity of gay and lesbian employees valued at approximately $1.4 billion.[22]

Moreover, the cost of diminished effectiveness of "invisible" gay workers (those workers overlooked by polls), who do not feel free to communicate openly with co-workers, will increase as the workplace environment becomes more highly interactive and as co-worker relations become more important to the successful completion of tasks.

Contrary to claims by the Family Research Council[23] and other opponents of ENDA, gays and lesbians are not more affluent than other groups. Rather, their wages actually suffer by reason of their sexual orientation. In the first economic study of sexual orientation discrimination, M. V. Lee Badgett, Ph.D., an Assistant Professor in the School of Public Affairs at the University of Maryland at College Park, who also is working for the Commission this summer, reveals that behaviorally gay, lesbian, and bisexual full-time employees earn less than heterosexual workers.[24]

Although some studies -- including those cited by the Family Research Council and other opponents of ENDA -- show that gays, lesbians and bisexuals often have higher incomes than heterosexuals, Dr. Badgett faults these studies because they: (1) overrepresent male, white, urban and well-educated individuals -- primarily by relying on responses from magazines and newspapers that distribute the surveys -- and therefore exaggerate average incomes; and (2) do not control for age or education -- both of which also have a tendency to raise wages.[25]

Dr. Badgett applied econometric tools developed in the study of the impact of race and gender discrimination on wages to sexual orientation discrimination. Using more reliably representative data (the General Social Survey conducted annually by the National Opinion Research Center) which since 1989 includes information on same-sex experiences, Dr. Badgett looked at a sample of 1,680 full-time employees. She estimated that gay/bisexual men earn from 11 to 27 percent less than heterosexual males (after controlling for education and occupation). She also calculated that lesbian/bisexual women earn from 5 to 14 percent

less than heterosexual women (after controlling for education and occupation), or 57.2 percent of a gay/bisexual man's income, or 64.8 percent of a heterosexual man's income.[26] She also explains that any differential in the household income of gay males is primarily due to gender discrimination, by which males enjoy an advantage in wages over women.[27] (Women currently earn approximately 72 percent of a man's income.)

Dr. Badgett also estimates that benefits to employers from this legislation would include reduced costs from the absence of discriminatory firing, which should amount to as much as $47.4 million -- estimated at approximately $10.7 million in training savings and $36.7 million in unemployment insurance savings.[28]

Fortunately for organizations and for their own well being, gay workers are increasingly questioning their silence in the workplace on the issue of sexual orientation. There is, as Ed Mickens pointed out, a growing "awareness that secrecy perpetuates shame, thwarts the building of community, and feeds prejudice. . . ."[29] Gay workers have begun to question the unfairness of the double standard by which many heterosexuals, who honestly and casually share with co-workers personal information, nevertheless wonder why lesbians and gay men feel a need to be open about their personal lives.[30]

Nearly 25 percent of the top 1000 largest corporations in this country, including GM, IBM, Digital, Microsoft, Eastman-Kodak, Levi Strauss, and AT&T, have non-discrimination policies which include sexual orientation.[31] Many employers have seen fit to adopt policies that reach far beyond what this legislation would require to provide benefits for same-sex domestic partners, leaves of absence to care for ill partners or for bereavement.[32]

Gay and Lesbian Legislative Advancements

Workplace homophobia flourishes partly as a result of a lack of federal legal protection. Unlike other identity groups in the workplace, gay workers are not covered by statutes such as Title VII of the Civil Rights Act of 1964 -- which prohibits employment discrimination based on race, color, sex, religion, and national origin; or the Age Discrimination in Employment Act -- which prohibits employment discrimination based on age; or the recently enacted Americans with Disabilities Act -- which prohibits employment discrimination based on disabilities.

A bill to include sexual orientation as a protected class has been stalled in Congress since 1978. Since that time, the gay and lesbian community has continued its struggle to achieve fairness and equality in the workplace. Their efforts have met with substantial success.

Since 1982, eight states -- California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, Wisconsin -- and the District of Columbia have passed laws protecting gays and lesbians from bias in housing and/or employment. In addition, eleven states -- Colorado, Louisiana, Maryland, Michigan, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Washington -- protect lesbian and gay employees in government service. Simular protection is extended by more than 100 localities nationwide. While this patchwork covers over 40 percent of the population and most major business centers, it is, nevertheless, inadequate. And some states -- including only last month, New York -- have failed to pass similar protection.

Moreover, since 1992, several states have encountered fierce challenges to gay rights, including in the workplace. During the 1992 elections, Colorado debated the merit of "Amendment 2" -- a ballot initiative that barred state and local governments from prohibiting discrimination based on sexual orientation. Set out in confusing language, the amendment was passed and later struck down as unconstitutional; it is still the subject of litigation.[33] Yet, this year five other states -- Idaho, Michigan, Nevada, Oregon, and Washington -- used Colorado's amendment as a model for ballot proposals. And similar initiatives have been the subject of signature drives in five other states -- Arizona, Florida, Maine, Missouri, and Ohio. Only the Idaho's "Proposition 1" and Oregon's "Measure 9" will be on the ballots this November.[34] Many more localities across the country also face comparable proposals for county or municipality ordinances.

The Employment Non-Discrimination Act of 1994

ENDA was carefully drafted to be narrow in scope and remedies. Its objective is not to give special federal status to gay, lesbian and bisexual workers in America's workplaces. Rather, the intent of this legislation is to provide gay, lesbian and bisexual workers a fair and equal opportunity to employment free of harassment and discrimination. It does so by giving these workers the limited right to challenge an employer's wrongful actions regarding biased hiring, firing, promotion, or compensation that have injured that employee. Just as a

person's race, color, national origin, sex, age, and disability have no bearing on a person's ability to get the job done, neither does a person's sexual orientation.

If enacted, this legislation would not present an onerous burden to employers. In fact, it is drafted more narrowly than Title VII of the Civil Rights Act of 1964, exempting small businesses with fewer than 15 employees, religious organizations (including religious educational institutions and other non-profit activities), and uniformed members of the armed services. ENDA would not require -- in fact, it explicitly prohibits -- that employers give preferential treatment based on sexual orientation, including quotas and affirmative action measures. Nor would ENDA require employers to provide benefits to same-sex domestic partners. In addition, because the disparate impact claim available under Title VII would not be available under ENDA, employers would not be required to justify a neutral practice that may have statistically disparate impact.

The true issue raised by ENDA is equal employment rights. "Sexual orientation" is broadly defined in the bill as "lesbian, gay, bisexual, or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations." Thus, this bill would protect not only gays and lesbians, but every worker. For example, a heterosexual arguably could not be denied employment because he or she was not gay or lesbian. Additionally, the bill arguably would protect that individual from harassing advances by a gay or lesbian supervisor. While protecting homosexual or bisexual employees against bias in the workplace, ENDA would also guarantee that all American workers would be judged solely on factors that are relevant to their job, such as qualifications or performance. ENDA merely levels the playing field.

Detractors of the bill frequently attempt to obfuscate this fact by appealing to the public's concerns over propagating "special rights." Indeed, political advisers concede that anti-gay legislation and amendments have a better chance of gaining popular support when posed in terms of creating "special rights" for gays and lesbians, than when described as concerning discrimination based on sexual preference.[55] In contrast, recent nation-wide polls show that 74 percent of Americans favor protecting gays and lesbians from job discrimination, and that most are under the misconception that federal law already supply these groups with equal employment rights.[56]

Conclusion

Again, I would like to express the Commission's strong support for the Employment Non-Discrimination Act of 1994. The potential for this bill to do good is tremendous. In the end, ENDA is concerned not with establishing special status for gays, lesbians and bisexuals, or with promoting so-called "alternative lifestyles," but rather with eliminating sexual orientation from the acceptable purview of an employer's considerations for basic employment decisions, and with preventing on-the-job intimidation and harassment on the basis of sexual orientation. ENDA would ensure fairness for all of this country's workers. President Clinton has declared that America does not have a person to waste and that includes gay, lesbian, and bisexual workers.

Finally, this makes economic sense. By promoting more openness and understanding in the workplace, this bill would help establish a workplace environment in which employees could focus on their requirements of their jobs, rather than issues of their private lives. ENDA, therefore, is a win-win proposition for all involved -- every worker benefits from protection against discrimination, employers save on extra training and unemployment insurance costs, and the American economy benefits from enhanced productivity.

END NOTES

1. *Book Lists Best Employers of Gays*, THE TIME-PICAYUNE, June 28, 1994, at F3, quoting a 1992 survey conducted in Philadelphia discussed in a Time Magazine report by William Henry.

2. Glenn Howatt, *Gay, Lesbian Workers becoming More Outspoken in the Twin Cities*, STAR TRIBUNE, September 6, 1992.

3. Lee Badgett, Colleen Donnelly and Jennifer Kibbe, *Pervasive Patterns of Discrimination Against Lesbians and Gay Men: Evidence From Surveys Across the United States* (National Gay & Lesbian Task Force Policy Institute, 1992), reviewing twenty surveys conducted between 1980 and 1991.

4. Dr. M. V. Lee Badgett, A Cost/Benefit Analysis of Coming Out (presentation for OUT Magazine press conference, April 21, 1993).

5. *Id.*

6. *Id.*

7. Dr. M. V. Lee Badgett, Economic Evidence of Sexual Orientation Discrimination (University of Maryland, April 1994).

8. Anthony P. Carnevale, THE AMERICAN ADVANTAGE (forthcoming Fall 1994).

9. *Book Lists Best Employers of Gays*, *supra* note 1.

10. Carnevale, *supra* note 8.

11. Howatt, *supra* note 2.

12. Jay K. Brause, *Closed Doors: Sexual Orientation Bias in the Anchorage Housing and Employment Markets*, in IDENTITY REPORTS: SEXUAL ORIENTATION BIAS IN ALASKA (Identity Incorporated, Anchorage, Alaska, 1989), cited in Lee Badgett, Colleen Donnelly and Jennifer Kibbe, *Pervasive Patterns of Discrimination Against Lesbians and Gay Men: Evidence From Surveys Across the United States* (National Gay & Lesbian Task Force Policy Institute, 1992).

13. Badgett, Donnelly and Kibbe, *supra* note 3.

14. Howatt, *supra* note 2.

15. Andrea Warren, *Hiding in the Corporate Closet*, BUSINESS DATELINE, March 1992.

16. Badgett, *supra* note 4.

17. Carnevale, *supra* note 8.

18. *Id.*; Badgett, Donnelly and Kibbe,*supra* note 3.

19. Carnevale, *supra* note 8.

20. *Id.*

21. Barry Goldwater, *Job Protection for Gays*, THE WASHINGTON POST, July 7, 1994, at A_.

22. Badgett, *supra* note 4

23. *Homosexuality is not a Civil Right*, LAS VEGAS REIVEW JOURNAL, June 16, 1994, reprinted from *In Focus*, (Family Research Council).

24. Badgett, *supra* note 7.

25. *Id.*; National Organization of Gay and Lesbian Scientists and Technical Professionals, Inc. (NOGLSTP) and Institute for Gay and Lesbian Strategic Studies, *Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men* (March 1994).

26. Badgett, *supra* note 7.

27. *Id.*; National Organization of Gay and Lesbian Scientists and Technical Professionals, Inc. (NOGLSTP) and Institute for Gay and Lesbian Strategic Studies, *Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men* (March 1994).

28. Badgett, *supra* note 7.

29. Ed Mickens, *The Invisible Minority: Gays and Lesbians in the Workplace*, BUSINESS ETHICS, July/August 1990, at 21.

30. Jay Lucas, *Working Under Cover: The Professional Lives of Gay Men and Lesbians: Implications for Human Resource Professional*, in *Invisible Diversity: A Gay and Lesbian Corporate Agenda* (September 20, 1991) excerpts from Jay Lucas and James D. Woods, WORKING UNDER COVER (forthcoming).

31. Human Rights Campaign Fund, Summary of the Employment Non-Discrimination Act of 1994, S. 2238; *END Bias: Civil Rights Based on Sexual Preference*, STAR TRIBUNE, July 20, 1994, at 12A.

32. *Book Lists Best Employers of Gays*, *supra* note 1, citing Ed Mickens, THE 100 BEST COMPANIES FOR GAY MEN AND LESBIANS (Pocket Books).

33. Kim I. Mills, *Few Anti-Gay Measures Will Appear on State Ballots in Fall*, ASSOCIATED PRESS, July 11, 1994, Monday AM Cycle; *Inside Politics: Gay Rights Friends and Foes Say Battle's Just Beginning* (CNN television broadcast, July 12, 1994, 4:47 PM EST)(transcript # 617-4, available of LEXIS, News Library, Curnws File).

34. Kim I. Mills, *Few Anti-Gay Measures Will Appear on State Ballots in Fall*, ASSOCIATED PRESS, July 11, 1994, Monday AM Cycle; *Inside Politics: Gay Rights Friends and Foes Say Battle's Just Beginning* (CNN television broadcast, July 12, 1994, 4:47 PM EST)(transcript # 617-4, available of LEXIS, News Library, Curnws File).

35. *Inside Politics: Gay Rights Friends and Foes Say Battle's Just Beginning* (CNN television broadcast, July 12, 1994, 4:47 PM EST)(statement by Bill McInturff, a Republican pollster)(transcript # 617-4 available of LEXIS, News Library, Curnws File).

36. Jill Lawrence, *Washington Today: Another Civil Rights Watershed*, ASSOCIATED PRESS, July 14, 1994.

RELIGIOUS ACTION CENTER
OF REFORM JUDAISM

Senator Edward M. Kennedy, Chairman
Senate Committee on Labor and Human Resources
Washington, DC

Dear Senator Kennedy:

We write on behalf of religious denominations and human relations organizations representing millions of religious Americans nationwide. Our organizations have endorsed the Employment Non-Discrimination Act (S. 2238) as an important effort to protect basic civil rights by prohibiting discrimination in the workplace based on sexual orientation. For all of us the protection of religious liberty is a paramount concern, and we are satisfied that ENDA gives proper regard to this concern.

The testimony of Robert H. Knight in opposition to ENDA mischaracterizes the broad exemption provided by ENDA to religious organizations as "narrow." ENDA broadly exempts from its scope any religious organization, including religious educational institutions. The only exception to this exemption is for a limited class of for-profit activities that are subject to unrelated business income tax under existing law. There is no reason to believe that the courts would read this exception so broadly as to swallow up the exemption to which it applies when it is clear that Congress had a broad exemption in mind in the first place.

Mr. Knight apparently characterizes the exemption as "narrow" because it applies only to religious organizations but not to commercial enterprises that are owned by individuals who may hold certain religious beliefs or may use the proceeds of their business, in part, to support other organizations that serve a religious mission. A general civil rights bill should not exempt individuals because those individuals have reasons based on their religious beliefs for discriminating. There is a substantial difference between a business operating in the arena of commerce and a religious corporation which exists to serve an explicitly religious mission.

To be sure, the Religious Freedom Restoration Act protects religiously observant individuals from the application of a law to them that requires violation of a religious belief unless the government can show a compelling interest for such application to them that cannot be satisfied by more narrowly tailored means. The courts will no doubt be asked in specific cases to determine whether the prohibition on discrimination on the basis of sexual orientation is this type of compelling interest. The answer to that question should remain for the courts to decide on a case-by-case basis.

Moreover, there is simply no basis for the concern that religious institutions will generally be put at risk by ENDA. The Supreme Court case to which Mr. Knight apparently refers denied non-profit status to a particular non-profit institution because of that institution's policy of racial discrimination. The history of racial discrimination in this country, and the amendments to the Constitution to which that history gave rise, place that case in a special context which cannot easily be extrapolated. And further, that case did not, in the end, compel the institution in question to violate its religious precepts.

Finally, with respect to Mr. Knight's characterizations of how "the great religions of the world" regard homosexual behavior, there are profound differences in religious perspectives on this subject. Individuals are, of course, free to believe what they will. But this does not necessarily mean that they are free to discriminate on the basis of those beliefs.

2027 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 387-2800
Fax (202) 667-9070

Rabbi David Saperstein
Director and Counsel

Rabbi Lynne Landsberg
Associate Director

Ellen Lazar Saltzberg
Chairperson
Commission on Social Action of Reform Judaism

Rabbi Elle Yedlin
Director
Commission on Social Action of Reform Judaism

We thank you for the opportunity to be heard on this crucial issue.

Richard T. Foltin
Legislative Director and Counsel
American Jewish Committee

Jane Hull Harvey
Assistant General Secretary
General Board of Church and Society
United Methodist Church

Rabbi David Saperstein
Director, Religious Action Center
Union of American Hebrew Congregations

Patrick Conover
Acting Director, Washington Office
United Church of Christ

Marian Nickelson
Acting Director
Lutheran Office for Governmental Affairs
Evangelical Lutheran Church in America

Mary Anderson Cooper
Associate Director
Washington Office
National Council of Churches

Kathleen Montgomery
Executive Vice President
Unitarian Universalist Association

Jess N. Hordes
Washington Representative
Anti-Defamation League

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

WILLIAM F. WELD
GOVERNOR

ARGEO PAUL CELLUCCI
LIEUTENANT-GOVERNOR

I support equality for all Americans and an end to discrimination based on sexual orientation. People should not lose their jobs because of factors unrelated to their work performance.

Anti-gay discrimination can sap workplace productivity and disrupt the lives of people who simply want to do a good job, pay their taxes, and be responsible members of the community.

However, under federal law, discrimination of this sort is still legal. People in most states can lose their jobs simply for being lesbian or gay. But job discrimination on the basis of sexual orientation is wrong.

I am proud to represent a state which has taken the lead in making discrimination on the basis of sexual orientation illegal.

Because of these principles and basic values, I support an end to job discrimination on the basis of sexual orientation. I also support the passage at the federal level of the Employment Non-Discrimination Act of 1994. It is a balanced approach to ending unfair discrimination against hard-working Americans.

Signature: William F. Weld Date: 7/21/94
R.- MASS.

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
CN-001
TRENTON
08625
(609) 292-6000

CHRISTINE TODD WHITMAN
GOVERNOR

I am proud to be the Governor of a state which recognizes that "equality" applies to all citizens unconditionally. Ours is a state of many faces, but we are one family. At the heart of this family is the principle of inclusion, meaning that no person is cast aside or denied equal opportunity for any reason. It is only when we recognize that we are all created equal that we can live and work together in harmony.

Currently, under federal law discrimination on the basis of a person's sexual orientation is legal. I am pleased that New Jersey already has laws protecting its gay and lesbian community against discrimination. Discrimination against gays has an adverse effect on productivity and morale in the workplace. In states that do not have laws prohibiting discrimination based on sexual orientation, members of the gay and lesbian community can be fired, demoted, lose job opportunities and employment benefits based on factors completely unrelated to their capabilities, experience or work performance.

In the spirit of equality, I whole-heartedly support passage of the federal Employment Non-Discrimination Act of 1994.

Signature: _____ Date: 8/17/94

AMERICAN BAR ASSOCIATION Governmental Affairs Office
1800 M Street, NW
Washington, DC 20036-5886
(202) 331-2200
FAX (202) 331-2220

August 22, 1994

The Honorable Edward M. Kennedy
Chairman, Committee on Labor
and Human Resources
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

The American Bar Association supports S.2238, the "Employment Non-Discrimination Act." This civil rights legislation, which would prohibit discrimination on the basis of an individuals's sexual orientation in hiring, firing, promotion, compensation, and other employment decisions, is both realistic and promising.

It is sensitive to the legitimate concerns of employers; and at the same time it protects the basic right of the employee to be judged on his or her own merits, rather than on the basis of irrational prejudice.

Over the years, and with some struggle, this nation has extended employment discrimination protection to individuals on the basis of race, religion, gender, national origin, age and disability. This legislation takes the next necessary step in assuring equal opportunity and equal justice under the law by extending this basic protection to a minority group which has been vilified and victimized -- gay men, lesbians, and bisexuals.

This bill does not create special protections or preferences for gay people; on the contrary, it specifically prohibits preferential treatment, including quotas, based on sexual orientation. It prohibits an employee from bringing a disparate impact suit based on sexual orientation, and it does not require an employer to provide benefits for the same sex partner of an employee. Finally, in addition to exempting small businesses with fewer than fifteen employees, as does Title VII, it also provides a broad exemption for religious organizations, including educational institutions substantially controlled or supported by religious organizations. This exemption is much broader than what is found in other employment discrimination statutes.

The concept of providing discrimination protection based on sexual orientation is gaining acceptance in both the public and private spheres. Not only do public opinion polls consistently show an increasing consensus among Americans that such prejudice is intolerable in the workplace, but eight states and many local governments already have adopted laws and ordinances prohibiting sexual orientation discrimination. In addition, the testimony presented to your Committee on July 29 is filled with examples of large companies -- Fortune 500 companies -- which have expanded their discrimination protection policies to include sexual orientation and have reported an increase in productivity and improved employee morale and comraderie. Indeed, businesses already know what Senator John Chafee said so clearly in his written statement on this issue: "Discrimination is contrary to our American principles, and only hobbles our efforts to keep the United States as productive as possible."

It is time for federal legislation which will outlaw employment discrimination based on sexual orientation so that every American will have the opportunity to be judged by the quality of his or her work, and not by factors that are wholly unrelated to job performance. The American Bar Association urges your committee to approve the "Employment Non-Discrimination Act" and bring it promptly to the Senate floor.

We respectfully request that this letter be made part of the hearing record.

Sincerely,

Robert D. Evans

Robert D. Evans

PRESS STATEMENT

STATEMENT OF RELIGIOUS LEADERS
ENDORSING THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

UNITED CHURCH OF CHRIST
OFFICE FOR CHURCH IN SOCIETY 700 Prospect Ave., Cleve., OH 44115 216.736.2174
110 Maryland Ave., N.E., Wash., D.C. 20002 • 202-543-1517

We join together to endorse the Employment Non-Discrimination Act of 1994. This bill is good news for the thousands of Americans denied job opportunities each year because they are gay, lesbian, or because someone perceives them as such. It is long past time to end this oppression.

The prophet Isaiah said, "The spirit of the Lord God... has sent me to bring good news to the oppressed." Those of us who are Jewish remember that this is central to the Exodus of Moses and to our own identity. Those of us who are Christian remember that Jesus claimed this passage for his ministry, and it is central to our identity.

No one should have to face discrimination in employment based on who they are. No one should suffer in the workplace because of their sexual orientation.

We confess that religious communities have contributed to such discrimination, and some still do. We look forward to the day when such discrimination is no more, and we count on early passage of the Employment Non-Discrimination Act to move us in this direction.

James Bell, Executive Director
Interfaith IMPACT for Justice and Peace

Valerie Russell, Executive Director
Office for Church in Society
United Church of Christ

David Saperstein, Director
Religious Action Center
Union of American Hebrew Congregations

John A. Buehrens, President
Unitarian Universalists Association

Kay Dowhower, Director
Lutheran Office for Governmental Affairs
Evangelical Lutheran Church in America

James A. Hamilton, Director
Washington Office
National Council of Churches

Jane Hull Harvey, Assistant General Secretary
General Board of Church and Society
United Methodist Church

Patricia Rumer, General Director
Church Women United

Robert Glover, Vice President
Homeland Ministries
Christian Church (Disciples of Christ)

Tim McElwee, Director
Washington Office
Church of the Brethren

Jess N. Hordes
Washington Representative
Anti-Defamation League

UNIVERSITY OF CALIFORNIA, DAVIS

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO · SANTA BARBARA · SANTA CRUZ

DEPARTMENT OF PSYCHOLOGY
TELEPHONE: (916) 752-1880
FAX: (916) 752-2087

DAVIS, CALIFORNIA 95616-8686

Hon. Edward Kennedy, Chairperson
Committee on Labor and Human Resources
Hart Senate Office Building
Room 440
Washington, DC 20510

Dear Senator Kennedy:

I am writing concerning the written testimony of Robert H. Knight of the Family Research Council. Specifically, I would like to offer my comments about the social science research relevant to some of the points he has raised about homosexuality.

I am a Research Psychologist at the University of California at Davis. However, I am not writing this letter on behalf of the University of California, but as an individual behavioral scientist with expertise on the topic of human sexuality.

I received my Ph.D. in 1983 in Psychology, with an emphasis in Personality and Social Psychology, from the University of California at Davis. I was a Post-Doctoral Fellow in Social Psychology at Yale University from 1983 to 1985. I have served as a Lecturer and Visiting Assistant Professor at Yale University and as an Assistant Professor at the Graduate Program in Social and Personality Psychology at the City University of New York. I am a fellow of the American Psychological Association and the American Psychological Society; am a member of numerous other professional organizations; have received several professional awards and honors; and have written more than three dozen articles and chapters related to the topics of homosexuality, gender, prejudice, and attitudes, which have been published in various academic books and journals. I am sending a copy of my curriculum vitae with this letter.

Definition of sexual orientation

Mr. Knight characterizes the definition of *sexual orientation* as being so vague as to include transvestitism and pedophilia. However, sexual orientation is commonly understood by social scientists and lay persons alike in a very specific sense. It refers to the gender of one's sexual or romantic partner, and encompasses only the categories of heterosexual, homosexual, and bisexual.

For example, the *American Heritage Dictionary of the English Language* (3rd ed., 1992, Houghton Mifflin) defines sexual orientation as "The direction of one's sexual interest toward members of the same, opposite, or both sexes" (page 1654).

The editors of one of the leading anthologies of papers reviewing data on homosexuality from the social and behavioral sciences define sexual orientation as an "erotic and/or affectional disposition to the same and/or opposite sex" (Gonsiorek & Weinrich, 1991, page 1). Furthermore, they caution against confusing sexual orientation with *biological sex* (that is, genetically determined maleness or femaleness), *gender identity* (the psychological sense of being male or female), or *social sex role* (adherence to a culture's standards for masculine or feminine behavior).

In its entry on *sexuality*, the 2nd edition of the *Encyclopedia of Psychology* (1994) defines sexual orientation as "the sex of the erotic/love/affectional partners a person prefers" (p. 399) and notes the use of the words *homosexual, heterosexual, and bisexual* in this context. It explicitly distinguishes transsexualism and transvestitism from sexual orientation.

Finally, in an entry that I wrote for the *Encyclopedia of Women's Studies* (1989, Volume 1), I defined sexual orientation as "an enduring erotic, affectional, or romantic attraction to individuals of a particular gender" (p. 344) and noted that sexual orientation is usually characterized as homosexual or heterosexual, but also can be bisexual.

In summary, the definition of sexual orientation is clearly understood by the vast majority of social scientists and, I suspect, by most of the general public as well. It does not encompass transvestitism or pedophilia, as suggested by Mr. Knight.

Homosexuals' "shorter life span"

Mr. Knight mentions a "study" by Paul Cameron of more than 6400 obituaries in homosexual publications, which "reveals that homosexuals typically have far shorter life spans

than the general population" (p. 5). It is important to recognize that this article was published in the author's own private newsletter rather than a reputable scientific journal, and thus was not subject to scientific peer review.

Based on Mr. Knight's brief description of Mr. Cameron's article, I can only conclude that it is fundamentally flawed. It apparently makes the basic error of assuming that individuals whose deaths are reported in the obituaries of homosexual publications constitute a representative sample of all gay people. However, this is an untenable assumption. It is widely recognized by social researchers that the readers of gay publications constitute only one segment of the gay community, and that many people who consider themselves to be gay or homosexual do not read such publications at all. Nor are the death notices in such publications exhaustive; whether or not a gay or lesbian individual's death is listed depends upon whether or not he/she or her/his survivors choose to list it.

Historically, most gay newspapers and magazines did not have an obituaries section until the onset of AIDS, and the bulk of obituaries in such publications now report AIDS-related deaths. Because AIDS particularly affects individuals under age 50, it is to be expected that the mean age of deaths reported in gay publications' obituaries will be lower than that of the general population. This study appears to have used such a biased and flawed methodology that it cannot be taken seriously.

Alcoholism and drug use

In the same section of his testimony, Mr. Knight cites a newsletter (again, not a scientific study) to make the point that "homosexuals are more likely [than heterosexuals] to have drug and alcohol abuse problems." He argues that employers should refuse to hire gay people in order to avoid the extra insurance expense and lost productivity that results from such "homosexual behavior."

It is true that several researchers (not cited by Mr. Knight) have reported high levels of alcohol and substance use among the gay men and lesbians included in their samples. However, their findings cannot be generalized to the entire gay community because the researchers did not use representative samples. Indeed, they often recruited their participants at gay bars and clubs, a strategy that inevitably includes disproportionately large numbers of people with drinking and substance use problems. (This is comparable to drawing conclusions about heterosexuals' levels of substance abuse on the basis of studies conducted with the patrons of singles' bars.) We simply do not know at this time the extent to which gay men and lesbians (compared to heterosexuals) engage in substance abuse.

We do know, however, that many employers have adopted nondiscrimination policies and that some have even provided insurance benefits to employees' same-gender domestic partners. Apparently, these employers have not experienced the sorts of expense and lost productivity predicted by Mr. Knight.

Another point worth noting is that most researchers who have found high levels of substance abuse among gay men and lesbians have attributed such behaviors to societal stigma. That is, they have concluded that substance abuse among gay people often reflects an attempt to cope with the stress created by living in a society that devalues, stigmatizes, and discriminates against them (e.g., in employment). If anything, the passage of federal legislation to protect people from employment discrimination on the basis of their sexual orientation should help to reduce such stigma, and thereby reduce maladaptive responses to the stress it creates for some individuals — whose numbers are not now known.

Demographic characteristics of gay people

Mr. Knight cites findings from marketing research to characterize gay people as affluent and well educated. The surveys he uses, however, were conducted with nonrepresentative samples — typically with the readers of gay publications, who (like readers of the *Wall Street Journal* or the *National Review*) are not representative of the larger population.

I know of two surveys conducted with representative populations of gay people that are relevant to Mr. Knight's assertions.

First, exit polls conducted by Voter Research & Surveys after the 1992 elections (Edelman, 1993) included a question about respondents' sexual orientation. Approximately 3% of the voters identified themselves as gay/lesbian/bisexual, which Edelman interpreted to be a lower bound of the likely number of such individuals in the larger population of voters. The average annual income for these men and women tended to be lower than for the entire sample, even though the lesbians and gay men tended to have higher educational levels. Gay men and lesbians also tended to be younger (that is, older people were less likely to identify themselves as gay), which may account for some of the income disparity (as people get older, their income tends to increase). It should be noted that this was a survey of voters, and thus may be biased toward including respondents who differ from the general population in some respects (e.g., education).

More recently, the 1993 Yankelovich Monitor survey included a question about sexual orientation. 5.7% of the sample identified themselves as gay or lesbian. Their mean household

income was approximately the same as for heterosexuals. However, because the gay men and lesbians tended to have higher levels of education, this pattern may actually indicate an income disparity (that is, gay people were more highly educated than heterosexuals but weren't getting paid more, on average, even though higher education is usually associated with higher income).

Immutability of sexual orientation

Mr. Knight asserts that "the existence of thousands of former homosexuals as well as bisexuals shows that homosexuality is not immutable or genetically fixed" (p. 5). Despite Mr. Knight's claims, there simply is no scientific documentation of the existence of large numbers of such "former homosexuals." Nor is there a scientific definition of what is meant by a "former" homosexual. Although some therapists have reported change of sexual orientation (from homosexual to heterosexual) in their clients, critics have detailed numerous ambiguities and problems with their methods and results (for a review, see Haldeman, 1991).

For example, in many reports of "successful" conversion therapies, the participants' initial sexual orientation has not been adequately assessed; many bisexuals have been mislabeled as homosexuals with the consequence that the "successes" reported for the conversions actually have occurred among bisexuals who were highly motivated to adopt a heterosexual behavior pattern. An additional problem is that "success" usually has been defined as suppression of homoerotic response or mere display of physiological ability to engage in heterosexual intercourse; neither of these should be equated with the adoption of a complex set of attractions and desires that constitute sexual orientation. Many interventions aimed at changing sexual orientation have succeeded only in reducing or eliminating homosexual behavior rather than in creating or increasing heterosexual attractions; they have, in effect, deprived individuals of their capacity for sexual response to others. Another problem is that even these inadequate operational definitions of change often have been assessed only through impressions of therapists or self reports rather than through verifiable indices (see Coleman, 1982; Haldeman, 1991; Martin, 1984).

The highly controversial claims by religious organizations to have changed homosexuals to heterosexuals generally have not been documented in such a way as to permit their critical evaluation (see Haldeman, 1991).

As recently as January of 1990, Dr. Bryant Welch, Executive Director for Professional Practice of the American Psychological Association, stated that "no scientific evidence exists to support the effectiveness of any of the conversion therapies that try to change one's sexual orientation" and that "research findings suggest that efforts to 'repair' homosexuals are nothing more than social prejudice garbed in psychological accouterments" (Welch, 1990).

Even if conversion therapies can change sexual orientation in a small number of cases, the question remains of whether it is ethical to do so. Dr. Gerald Davison (1991), a former president of the Association for the Advancement of Behavior Therapy, argued that change of orientation programs are ethically improper and should be eliminated, and that their availability only confirms professional and societal biases against homosexuality.

In summary, Mr. Knight's assertion about the mutability of sexual orientation is erroneous. Regardless of its biological or environmental origins, sexual orientation is perceived by most people to be fixed and unchangeable, an integral part of themselves. Neither heterosexuality nor homosexuality represent a conscious choice for most people. Attempts to change sexual orientation from homosexual to heterosexual that have been documented sufficiently to permit critical evaluation appear to have been largely unsuccessful.

In summary, Mr. Knight's testimony contains several inaccurate characterizations of gay men and lesbians as well as the nature of homosexuality and sexual orientation. I have tried in this letter to comment briefly from my perspective as a researcher. Please contact me if I can provide any further information or clarification.

Sincerely,

Gregory M. Herek

Gregory M. Herek, Ph.D.
Research Psychologist

References Cited

Coleman, E. (1982) Changing approaches to the treatment of homosexuality: A review. In W. Paul, J. Weinrich, J. Gonsiorek & M. E. Hotvedt (Eds.), *Homosexuality: Social, Psychological, and Biological Issues* (pp. 81-88). Newbury Park: Sage.

Davison, G.C. (1991). Constructionism and morality in therapy for homosexuality. In J. Gonsiorek & J. Weinrich (Eds.), *Homosexuality: Research implications for public policy*. Newbury Park, CA: Sage.

Edelman, M. (1993). Understanding the gay and lesbian vote in '92. *The Public Perspective*, pp. 32-33.

Gonsiorek, J., & Weinrich, J. (Eds.) (1991). *Homosexuality: Research implications for public policy*. Newbury Park, CA: Sage Publications.

Haldeman, D.C. (1991). Conversion therapy for gay men and lesbians: A scientific examination. In J. Gonsiorek & J. Weinrich (Eds.), *Homosexuality: Research implications for public policy*. Newbury Park, CA: Sage.

Martin, A.D. (1984). The emperor's new clothes: Modern attempts to change sexual orientation. In T. Stein & E. Hetrick (Eds.), *Innovations in psychotherapy with homosexuals* (pp. 24-57). Washington, DC: American Psychiatric Press.

Welch, B.L. (1990, January 26). *Statement of Bryant L. Welch, J.D., Ph.D.* Washington, DC: American Psychological Association.

July 20, 1994

The Honorable Edward M. Kennedy
United State Senate
315 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

On behalf of the American Psychiatric Association (APA), a medical specialty society representing more than 38,000 psychiatrists nationwide, I am writing to commend you for your strong leadership on the proposed Employment Non-Discrimination Act (S. 2238) and to offer our strongest support for your efforts to prohibit employment discrimination against persons on the basis of sexual orientation.

The bill is a long-overdue recognition that many American citizens are denied equal opportunity in the workplace -- as, indeed, in other areas of life -- not on the basis of job qualifications or professional capability, but simply on the basis of their sexual orientation. Despite some changes, lesbians, gay men and bisexuals remain that segment of society against whom discrimination is not only socially acceptable but legally sanctioned.

Without question, in banning employment discrimination by the covered entities on the basis of "sexual orientation," S. 2238 represents a most significant step forward in according all persons the opportunity to be judged fairly as individuals. That this legislative battle still must be waged 30 years after the Civil Rights Act of 1964 is a measure of the challenge that American society confronts in ridding itself of costly bias-based discrimination.

In leading the struggle -- and, as you recognize, it will be a struggle -- for this legislation, you courageously declare that this unjust discrimination must cease and offer substantial legal remedies to achieve that goal. Our hope is that this invidious discrimination can someday be reached legally not just in those entities covered by S. 2238, but also, for example, in the armed forces where such discrimination continues unabated.

The American Psychiatric Association is pleased to support your outstanding work against employment discrimination on the basis of sexual orientation. With equality, fairness and tolerance as our foundation, we are

strengthened as a nation when we oppose such hateful discrimination. The proposed Employment Non-Discrimination Act is critically important in ensuring that these fundamental American values are no longer denied to lesbian, gay and bisexual citizens.

Sincerely,

Melvin Sabshin, M.D.
Medical Director

MS/klb

Yankelovich Partners Inc.
101 Merritt 7 Corporate Park
Norwalk, CT 06851
203 846 0100
203 845 8200 Fax

Yankelovich Partners

Honorable Edward M. Kennedy
Chairman
Senate Committee on Labor and Human Resources
U.S. Senate
Washington, D.C. 20510-6300

Dear Senator Kennedy:

In June of this year, Yankelovich Partners Inc. released a number of findings drawn from a nationally projectable sample of gay and lesbian Americans. An extended version of these findings are available from Yankelovich Partners Inc. in a report titled: Yankelovich MONITOR®: Gay/Lesbian Report.

This comprehensive gay/lesbian report explains the significant findings related to the gay and lesbian population, including its size and income.

What follows here is both a brief background that addresses how the sample was drawn and why it is more credible than other studies that employ a different methodology, and an excerpt of findings from the Yankelovich MONITOR: Gay/Lesbian Report.

Background:

The gay/lesbian sample was identified by means of an item in the 1993 Yankelovich MONITOR® (a nationally representative study of Americans aged 16 years and older, conducted annually since 1971). Specifically, respondents were asked to choose from a list of 52 adjectives/phrases, those which describe them. This list was presented to them in a spiral binder of exhibit cards which the respondent controlled. The interviewer then asked the respondent to read only the corresponding number beside each item. The exact wording of the item used to identify respondents for this analysis was "Gay/homosexual/lesbian."

It is important to note three observations:

(1) Samples derived from gay/lesbian magazine subscription lists or from those people who voluntarily return mail questionnaires are neither random nor representative of the population as a whole, they contain substantial bias. The Yankelovich MONITOR study, on the other hand, was conducted door-to-door and is random and nationally representative.

(2) This is a self-identified gay/lesbain sample, and, therefore, may be superior to a behavioral definition because it makes no presumptions and imposes no behavioral threshold as to when one will be considered gay or not.

(3) The structure of the interviewing guaranteed a high level of anonymity for the respondents. In surveys we have conducted which asked the respondent to write their name on the questionnaire (a low level of anonymity), response rate to similar questions designed to identify gays and lesbians was substantially lower.

We have applied rigorous analysis to ensure that the findings in the Yankelovich study are reliable. As one reporter from CNBC put it, this could be "the most credible study to date."[1]

Excerpted Findings:

- The gay/lesbian sample in this report represents approximately 6% of the US population. This population is *similar* to the heterosexual population[2] in terms of:
  - Age
  - Gender
  - Ethnicity
  - Occupation and employment
  - Income

Income

Income among the gay/lesbian population as a whole is slightly lower than that of the heterosexual population. This finding contradicts a popular myth about the relative affluence of gays/lesbians, one that is often based on comparisons between general population data and data collected among readers of particularly upscale gay and lesbian publications.

A more reliable and valid comparison of income is presented in the following tables, using data which compares the general population of gays/lesbians to the general population of heterosexuals. Overall income is slightly lower for the gay/lesbian group as a whole, a difference that is driven primarily by the slightly lower earnings of gay men compared to the heterosexual group. There is no substantial difference in overall income distribution between lesbians and heterosexual females; in both cases, female income is below that of males.

There is a difference, however, in the earning power of gay males and heterosexual males. While it is true that some dual-income-earning, predominately white, gay male households have incomes much greater than the national average, overall, we found that gay males had lower personal and household incomes than their heterosexual counterparts.

---

[1] MARKETWRAP June 9, 1994, CNBC, 5:00 PM EST

[2] Heterosexual population = Total sample minus the gay/lesbian sample

We hope that this non-biased information has bettered your understanding of the gay/lesbain population. The Yankelovich MONITOR. Gay/Lesbian Report includes a host of other information that we can provide to you at your behest.

Sincerely,

J. Rex Briggs
Project Director
Encl.

cc: Tom Flynn, Managing Partner U.S. Operations

Family Research Institute, Inc.

Scientists Defending Traditional Family Values

Paul Cameron, Ph.D., William Playfair, M.D., Kirk Cameron, Ph.D., & Keith Abbott, J.D.
P.O. Box 2091, Washington, D.C. 20013 (703) 690-8536

July 19, 1994

Labor and Human Resources Committee
Hart 440
Washington, DC 20510

I should like to testify regarding S2238, the Employment Non-Discrimination Act of 1994. I will present empirical work that suggests that those who engage in homosexuality live relatively brief lives (with a median age of death for gays in the early 40's and for lesbians in the mid-40's as compared to the early 70's for non-gays and late 70's for non-lesbians). This means that a disproportionate number of homosexuals will not develop into mature, highly productive workers and professionals. As such homosexual practitioners will disproportionately frequently fail to justify the training and experience an employer would provide. Further, I will summarize evidence that homosexuals are more apt to be absent due to sickness and to succumb to major illnesses while in employ, both of which drive up costs to the employer. Thus employment discrimination, where it exists against those who engage in homosexuality, is both rational and reasonable from a business standpoint, rather than a prejudicial discrimination requiring legal remedy.

Sincerely,

Paul Cameron

Testimony by Robert H. Knight
before the Committee on Labor and Human Resources
July 29, 1994

Senators, thank you for including the Family Research Council in your hearing.

Some people are telling you stories of how they have suffered because of discrimination, and these accounts are compelling. No one likes to bring pain to anyone. But I must tell you that we feel just as strongly about what kind of world we are creating for our children and families.

As a pro-family organization, we see the Employment Non-Discrimination Act as less about tolerance than about the government forcing acceptance of homosexuality on tens of millions of unwilling Americans. The bill essentially takes away the rights of employers to decline to hire or promote someone who openly acknowledges indulging in behavior that the employer or his customers find immoral, unhealthy and destructive to individuals, families and societies. Employers would lose the right to include character in their assessment of a prospective employee, and that would be tyranny. Martin Luther King Jr. said that a just society would judge people not by their skin color but by the content of their character, and character involves behavior. Many employers believe that homosexual behavior is immoral and they recognize that it has been discouraged in every successful culture in the world.

The issue here is not job discrimination. It is whether private businesses will be forced by law to accommodate homosexual activists' attempts to legitimize homosexual behavior.

If this bill becomes law, for the first time in history Americans will be told that they must hire people they believe to be committing immoral acts *precisely* because they commit those acts. This interferes with freedom of association, freedom of speech and freedom of religion.

The great religions of the world condemn homosexual behavior in their scriptures. The sponsors of this legislation purport to tell Orthodox Jews, orthodox Christians, orthodox Muslims and members of other faiths that they can no longer allow their religious beliefs to influence their private business decisions. The American Revolution was fought over less intrusion into the lives of the colonists.

The bill contains a religious exemption, but for-profit activities by religious organizations are specifically removed from that protection. It is unlikely that the religious exemption could retain its strength because the courts may construe it narrowly, removing many organizations that may in fact have a religious point of view but don't have a formal relationship with a church. The Mormon Church would be particularly vulnerable, since the church leadership is often supported through for-profit corporations. But other religious institutions would be put at risk, since the Supreme Court has ruled in other contexts that the beliefs and practices of nonprofit institutions must be in accord with federal public policy.

Because of the bill's narrow wording regarding exemptions, institutions that could be targeted by homosexual activists include summer camps for children, the Boy Scouts, Christian bookstores, religious publishing houses, television and radio stations, and of course, *any* business with 15 or more employees.

The recently enacted Religious Freedom Restoration Act allows government to override religious objections if the state can prove a "compelling interest" in doing so. The bill's "findings" could be cited as evidence in efforts to prove "compelling interest."

You have heard heart-wrenching personal stories of discrimination, but how many employers have you heard from? Perhaps you should invite Bryan Griggs to testify before you.

Mr. Griggs is president of a small business in Seattle, Washington. Recently, a former employee of Mr. Griggs filed a complaint of employment discrimination with the Seattle Human Rights Department (SHRD), stating that Mr. Griggs had created a "hostile work environment" towards homosexuality. Mr. Griggs' crimes include playing conservative radio talk shows that carried his firm's advertisements, posting a letter from a congresswoman

regarding his inquiry about her views on the military's homosexual exclusion policy, and having a note on his desk that he wrote to himself concerning homosexuals and adoption of children.

The former employee, John Dill, who was laid off with several other employees, volunteered for a time and then left of his own accord. He complained to the agency that he found Mr. Griggs' opinions objectionable, but acknowledges that Mr. Griggs was not told that any of this was objectionable at the time, nor that Mr. Dill was a homosexual. Having had to spend several thousand dollars defending himself, Bryan Griggs now knows firsthand what "gay joo discrimination" laws mean to employers. Another former Griggs employee has filed an affidavit with SHRD stating that as a homosexual, he did not feel harassed in any way by Griggs' actions during his employment, which approximated the same time that Dill was in the office.

Griggs' innocence did not protect him from legal harassment of this kind, which potentially threatens every business in America if a federal "homosexual jobs bill" becomes law. Such legislation is aimed not only at legally preventing businesses from declining to hire or promote an openly homosexual person, but also at creating "gay affirmative" work places, thus interfering with freedom of speech, not to mention freedom of religion and freedom of association. This is already occurring in the federal government, where employees are being subjected to open ridicule of their most deeply held beliefs. All in the name of tolerance.

Polls show that when the issue is framed as: "do you think people should be discriminated against in the work place simply because they are gay?" many Americans say no. To their credit, Americans are by and large a generous and tolerant people whose hearts go out to anybody who seems to be a victim. But when they are asked about specifics, they begin to understand what legislation like this is all about. When asked whether homosexuals should be role models for children, a majority say no.[1] So if you ask the American people whether a day care center should be forced to employ lesbians, it is unlikely that a majority would say *yes*. If you ask them whether Boy Scout troops should be forced to accommodate homosexual Scoutmasters, it is unlikely that a majority would say *yes*.

The wording of the bill is designed to accommodate much more than the few specifically mentioned categories. When you define orientation as "real or perceived," you open up a pansexual pandora's box for litigious groups. Under this bill, a man could one day come to work in a dress and high heels, stating that his transvestitism is an integral part of his sexual orientation. I doubt that any of the Senators here would allow this type of sexual orientation to be given free rein on their own staffs. Yet this bill, as we see it, would open you and every other employer of 15 or more people to harassing lawsuits.

And this fits in well with the strategy that has been openly advertised by homosexual activists. In the book After the Ball, by Marshall Kirk and Hunter Madsen, a candid blueprint for homosexual activists, the authors recommend an incremental approach:

"You get your foot in the door, by being as *similar* [italics in original] as possible: then and only then--when your one little difference is finally accepted--can you start dragging in your other peculiarities, one by one. You **hammer in the wedge narrow end first** [boldface in original]. As the saying goes, Allow [sic] the camel's nose beneath your tent, and his whole body will soon follow."[2]

The authors also have this to say about the homosexual agenda:

"The public should not be shocked and repelled by premature exposure to homo*sexual* [italics in original] behavior itself. Instead, the imagery of sex per se should be downplayed, and the issue of gay rights reduced, as far as possible, to an abstract social question....In any campaign to win over the public, gays must be portrayed as victims in need of protection so that straights will be inclined by reflex to adopt the role of protector."[3]

The authors go on to describe how to use the media to characterize all opponents as filled with hate and bigotry,[4] techniques that we have seen being used to great effect, particularly in some documentaries presented on the Public Broadcasting Service such as *One Nation Under God* or National Public Radio's *In Jesus' Name: The Politics of Bigotry*.

This bill before you will not only affect people who believe that homosexuality is immoral, unhealthy and destructive to individuals, families and societies. It will entangle businesses of all types in expensive litigation.

The Senate version of the bill contains "findings" that are designed to be used to buttress legal briefs in virtually all cases involving homosexual rights, from adoption of children to gay "marriage." Congress would be giving the homosexual rights lobby a loaded gun. Or better yet, a Christmas tree on which to hang all the ornaments of the homosexual rights movement. We know from past legislation that protections for religion and against quotas are often undermined when implementation regulations are written, when the law is enforced, and when the courts begin interpreting them. It is quite likely that the Equal Employment Opportunity Commission, which recently sought to create religion-free work places in the name of freedom of religion, will write broad guidelines surrounding sexual orientation harassment. In fact, it does not take much imagination to see that the trend would be to mandate not mere anti-discrimination law but to require employers to create gay-affirmative work places for all employees, much as several agencies of the federal government have already done (Transportation, Health and Human Services, Office of Personal Management, Forestry Service, etc.). Never mind that this would violate the freedom of conscience of millions of American taxpayers, much as it is already violating the freedom of conscience of hapless federal employees.

The bill says that quotas are "prohibited." But such legislation typically leads to unofficial quotas, as targets of government enforcers begin favoring government-approved groups to prove that they are abiding by the law.

Inclusion of "bisexuals" implies official sanction for non-monogamous sex. We are no longer talking about even the rare "monogamous gay couple," but people who have sex with both sexes. This legislation uses the power of law to protect sexual promiscuity. That would be bad at any time, but it is particularly irresponsible in the Age of AIDS. The bill's definition of sexual orientation is deceivingly limited. Some psychologists are now arguing that pedophilia is a sexual orientation and therefore deserving of legal protection. Next year will it be illegal for employers to discriminate against child molesters?

Homosexual activists often use attractive libertarian arguments such as: "Sex practices are private matters. What goes on in the bedroom is of nobody else's concern." That is false, of course, since two people's sexual behavior affects whole families and even communities. That is why societies the world over for thousands of years have by law and custom discouraged sexuality outside the marital bond. The "homosexual jobs bill" does just the opposite: it makes an employee's sex practices a matter of public concern, and places homosexuality on a moral par with marriage and family. In fact, it could be argued that it raises it a notch higher, because there is no specific hiring protection for married people.

The Senate bill notes that "an individual's sexual orientation bears no relationship to the individual's ability to contribute fully to the economic and civic life of society." This ignores abundant evidence from major medical journals, such as the *New England Journal of Medicine*, *The Lancet*, the *British Medical Journal*, *Annals of Internal Medicine*, the *American Journal of Public Health* and the *Journal of the American Medical Association*, that homosexual behavior is extremely unhealthy, contributing to the spread of AIDS, hepatitis A, B and C and other sexually transmitted diseases, including those afflicting the gastro-intestinal tract known as "gay bowel syndrome."[5] A study of more than 6,400 obituaries in homosexual publications reveals that homosexuals typically have far shorter life spans than the general population.[6] Other reports indicate that homosexuals are more likely to have drug and alcohol abuse problems.[7] It is unfair to force businesses to pay the extra insurance expense and lost productivity that inevitably results from homosexual behavior. Most companies are now promoting healthy behavior among their employees, such as reduction of smoking and alcohol intake. By the reasoning of this bill, alcoholics should get special protections in hiring and promotion that are not available to other employees.

Proponents argue that homosexuals are a discrete and insular minority who have been excluded from full participation in the political process and have been historically discriminated against. A closer look reveals that this is simply false.

•• Homosexuals display political power far beyond their numbers. A tiny fraction of the population (about 1 percent), homosexuals have one of the largest and fastest growing Political Action Committees in the country (The Human Rights Campaign Fund) and give millions of dollars to candidates, including an estimated $3 million to the Clinton\Gore campaign. Also, homosexual activists such as Roberta Achtenberg have been appointed to several high government posts. Homosexual groups have also been able to commandeer more annual taxpayer funding for AIDS (the nation's No. 9 killer) than for cancer (No. 1) or heart disease (No. 2).

•• Minority groups share immutable, benign, non-behavioral characteristics such as race, ethnicity or national origin. Homosexuals are the only group to claim minority status based on behavior. There is no reliable scientific evidence showing that homosexuality is biological in origin.[3] The existence of thousands of former homosexuals as well as bisexuals shows that homosexuality is not immutable or genetically fixed.

•• Homosexuals are among the most economically advantaged people in our country. Research by marketing firms shows that as a group homosexuals have higher than average per-capita annual incomes ($36,800 vs. $12,287),[9] are more likely to hold college degrees (59.6 percent vs. 18 percent),[10] have professional or managerial positions (49 percent vs. 15.9 percent)[11] and are more likely to be overseas travelers and frequent fliers.[12] According to homosexual-marketing specialist Jeff Vitale of Overlooked Opinions, gays constitute "one of the most lucrative markets in America with a tremendous amount of discretionary income."[13] According to Business Week, homosexuals are also five times more likely to make over $100,000 a year than non-homosexual Americans.[14] American Express spokeswoman Maureen Bailey says homosexual consumers are "very attractive because they are high-earning, high-spending and they travel a lot."[15]

•• Unlike some genuine minorities, then, homosexuals can hardly be said to be suffering economic or political deprivation. In the Colorado Amendment Two case, which involved a ballot measure which amended the state constitution to prevent jurisdictions from adding sexual orientation to the list of specially protected minority classes, Colorado District Court Judge H. Jeffrey Bayless ruled in December 1993 that homosexuals do not constitute such a "suspect" class.[16]

Twenty-one states have laws prohibiting sodomy. This federal legislation is a violation of their right to set public policy on some aspects of sexual behavior -- a right enjoyed by every major civilization and every small tribe in the world.

Conclusion

Homosexuals already enjoy the civil rights that all Americans have, and do not need or deserve special legal rights based on sexual behavior. At a time when employers are taking steps to discourage certain unhealthy behaviors (like smoking) at--and away from--the work place, it is irresponsible for the federal government to require them to accommodate and legitimize other unhealthy behaviors. Legislation to grant such status is less about tolerance for homosexuals than about government-enforced tyranny over those who believe in sexual morality.

Endnotes

1. *Time*/CNN poll conducted June 15-16, 1994 by Yankelovich Partners Inc., cited in *Time*, June 27, 1994, p. 57.

2. Marshall Kirk and Hunter Madsen, After the Ball: How America Will Conquer Its Fear & Hatred of Gays in the 90s, (New York: Doubleday, 1989), p. 146.

3. Ibid, pp. 178, 183.

4. Ibid, pp. 189-190. The authors openly applaud ways "to vilify those who victimize gays. The public should be shown images of ranting homo-haters whose associated traits and attitudes appall and anger Middle America. The

images might include: • Klansmen demanding that gays be slaughtered or castrated; • Hysterical backwoods preachers, drooling with hate to a degree that looks both comical and deranged....In TV and print, images of victimizers can be combined with those of their gay victims by a method propagandists call the 'bracket technique. For example, for several seconds an unctuous beady-eyed Southern preacher is shown pounding the pulpit in rage against 'those perverted, abominable creatures.' While his tirade continues over the soundtrack, the picture switches to heart-rending photos of badly beaten persons, or of gays who look decent, harmless, and likable, and then we cut back to the poisonous face of the preacher. The contrast speaks for itself ..."

5. See, for instance, V. Beral, et al., "Risk of Kaposi's Sarcoma and Sexual Practices Associated with Faecal Contact in Homosexual and Bisexual Men with AIDS," *Lancet*, 339, 1992, pp. 632-635; L. Musick, et al., "AIDS and sexual behaviors reported by gay men in San Francisco," *American Journal of Public Health*, 75, 1985, pp. 493-496; L. Corey, and K.K. Holmes, "Sexual transmission of Hepatitis A in homosexual men," *New England Journal of Medicine*, 302, 1980, pp. 435-438; "The HIV/AIDS Surveillance Report," U.S. Department of Health and Human Services, Centers for Disease Control, National Center for Infectious Diseases, Division of HIV/AIDS, January 1992, p. 9; H.W. Jaffee, C. Keewhan, et al., "National Case-Control Study of Kaposi's Sarcoma and Pneumocystis Carinii Pneumonia in Homosexual Men: Part I, Epidemiological Results," *Annals of Internal Medicine*, 99 (2), 1983, pp. 145-157; Mireya Navarro, "Federal Officials See Sharp Rise of Hepatitis Among Gay Men, *The New York Times*, March 6, 1992.

6. P. Cameron, K. Cameron, S. Wellum, "The Homosexual Lifespan," Family Research Institute, Inc., Washington, D.C., 1992.

7. According to the National Lesbian-Gay Health Foundation, homosexuals are about three times as likely to have an alcohol or drug abuse problem, as cited in "Gays Are More Prone to Substance Abuse," *Insight*, November 5, 1990.

8. See, for instance, William Byne and Bruce Parsons, "Human Sexual Orientation: The Biologic Theories Reappraised," *Archives of General Psychiatry*, Vol. 50, March 1993, pp. 228-239.

9. "Overview of the Simmons Gay Media Survey," Rivendell Marketing Company, Plainfield, New Jersey, undated, p. 1. See also: Dennis Kneale, "Gay Consumer Spending," *The Wall Street Journal*, February 10, 1989.

10. Ibid, Simmons Survey.

11. Ibid.

12. Ibid.

13. Sally Jacobs, "Gay-oriented Ads Follow Consumer Out of the Closet," *The Boston Globe*, March 7, 1994.

14. Julie Tilsner, "Gold in the Gay Games," *Business Week*, July 4, 1994, p. 28.

15. Jacobs, *op. cit.*

16. "Findings of Fact, Conclusions of Law and Judgment, *Evans, et al. v. Romer*, No. 92, CV 7223, 1993, p. 14. Judge Bayless noted that homosexuals were denied such status in *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) and *High Tech Gays v. Defense Industrial Clearance Office*, 895 F.2d 563 (9th Cir. 1990), and he wrote "the court cannot conclude that homosexuals and bisexuals remain vulnerable or politically powerless and in need of extraordinary protection from the majoritarian political process."

APPENDIX I

Employment Discrimination Cases

The following case summaries represent an extensive sampling of the types of actions and decisions that have focused on allegations of employment discrimination based on sexual orientation. Cases involving members of the U.S. Armed Forces have been excluded. It is organized by cause of action into eight separate sections, each section including cases principally based on that cause of action. The cases are summarized in chronological order within each section, with the most recent cases appearing first. A ninth section lists cases that have not yet been analyzed for this study.

I. Cases Alleging Violations of the U.S. Constitution.

A. General.

1. Burton v. Cascade School District (1975). Peggy Burton was a teacher at Cascade High School in Oregon. During her second year of teaching, the Cascade School Board became aware of the fact that Peggy was a "practicing" lesbian and fired her under an Oregon statute that allowed teachers to be dismissed for "immorality." Burton challenged her dismissal under 42 U.S.C. § 1983 as a violation of her federal constitutional rights (no specific right cited).

The U.S. District Court for Oregon found the statute, which did not define immorality, to be unconstitutionally vague. It awarded Burton monetary relief but refused to reinstate her to her teaching position. The U.S. Circuit Court of Appeals for the Ninth Circuit affirmed the decision, holding that since Burton was a probationary employee whose annual contract could be left unrenewed by the school district for any good cause reason, her legal interest in her position was not strong enough to warrant reinstatement given the disruption it would cause at the school. The Ninth Circuit expressly declined to address the question of whether or not the school system could refuse to rehire Burton because of her sexual orientation. Cite: *Burton v Cascade Sch. Dist. Union High Sch. No 5*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975).

2. **Brass v. Hoberman (1968).** Ronald Brass and Frederick Teper applied for state civil service positions as caseworkers for the New York City Department of Social Services. Both passed the required written and medical examinations, but were turned down when their interviews revealed histories of homosexuality. Brass and Teper sought a preliminary injunction prohibiting the department from enforcing its policy of not allowing gays and lesbians to serve as caseworkers, claiming the policy lacked a rational relationship to a legitimate government interest and thus was arbitrary and capricious discrimination in violation of their federal constitutional rights (no specific right cited).

The U.S. District Court for the Southern District of New York denied the preliminary injunction. The court reviewed conflicting psychiatric affidavits provided by each side regarding the emotional stability, maturity and general suitability of gay people for caseworker duties and found that Brass and Teper had not been able to demonstrate that the Department's actions lacked a rational basis. Cite: *Brass v Hoberman*, 295 F. Supp. 358 (S.D. N.Y. 1968).

B. Cases Alleging a Violation of the Equal Protection Clause.

1. **Jantz v. Muci (1992).** Vernon Jantz began work as a part time teacher with the Kansas school system in 1987. During the 1988-89 school year he applied for a full time position and was turned down based on the recommendation of Muci, the principal at the high school where Jantz worked. Jantz sued Muci in federal court, claiming his recommendation was based on his belief that Jantz was gay and that the decision infringed upon his federal constitutional right to equal protection of the laws in violation of 42 U.S.C. § 1983.

The district court rejected Muci's motion for summary judgment, holding the evidence presented by Jantz was sufficient to present a triable issue of fact regarding whether a central factor in Muci's decision was his belief that Jantz was gay. It also rejected Muci's claim for qualified immunity for acts taken as a state official, holding that Muci could not be considered to have been acting within the scope of his office because by that time it had been established as a matter of law that there was no rational basis for blanket sexual orientation-based employment discrimination. *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991).

The U.S. Court of Appeals for the Tenth Circuit reversed, holding the issue of whether there was a rational basis for excluding gay people from teaching positions was an open question of law at the time of Muci's recommendation. Thus, Muci's claim of qualified immunity was valid and he was protected from being sued as an individual for his actions. It further held the school district could not be held liable since the school board, not Muci, possessed the final authority for the decision and the school board had acted unaware of the discriminatory basis that allegedly influenced Muci's recommendation. Cite: *Jantz v Muci*, 976 F.2d 623 (10th Cir. 1992).

2. **Wolotsky v. Huhn (1992).** Steven Wolotsky worked as a licensed social worker with Portage Path Community Mental Health Clinic, a private, non-profit corporation providing mental health counseling services under contract to the State of Ohio. He was terminated without warning or hearing when a patient alleged that Wolotsky had engaged in sex with him. Wolotsky sued his former employer in federal court, claiming his federal constitutional rights to due process and equal protection were infringed in violation of 42 U.S.C. §§ 1983 & 1985. The court granted partial summary judgment against Wolotsky on all federal claims and dismissed on jurisdictional grounds several remaining tort claims.

The U.S. Court of Appeals for the Sixth Circuit affirmed, holding that Portage Path's ties to the state were sufficiently attenuated that its actions could not be described as taken under the color of state law as required by § 1983 and the due process and equal protection clauses of the Fourteenth Amendment. The § 1985 based claim was rejected on the grounds that, although § 1985 protects against private discrimination, Wolotsky had failed to allege he was discriminated against because of race or other class-based considerations, as required by § 1985. Cite: *Wolotsky v Huhn*, 960 F.2d 1331 (6th Cir. 1992).

3. **Delahoussaye v. City of New Iberia (1991).** David Delahoussaye was a police officer working for the City of New Iberia who had been laid off for economic reasons. He was scheduled to be reemployed by the city's police department when the department learned Delahoussaye had been detained previously for allegedly engaging in homosexual acts in a public restroom. After a hearing, the city found Delahoussaye had engaged in the alleged acts and removed his name from its civil service reemployment list. Delahoussaye sued the city, claiming that its actions violated his federal constitutional rights of due process and equal protection of law.

The U.S. District Court for Louisiana granted summary judgment in favor of the city. The court held that "rational basis" review was the appropriate standard to apply and that the city's action was rationally related to a legitimate government interest in protecting the police department from acts prejudicial to the department and to the public interest. The U.S. Court of Appeals for the Fifth Circuit affirmed, adopting the district court's reasoning. Cite: *Delahoussaye v. City of New Iberia*, 937 F.2d 144 (5th Cir. 1991).

4. **Moshi v. Bally Corporation (1990).** Ramona Moshi alleged she was fired from her position with the Bally Corporation because she was a lesbian. She challenged her dismissal in the U.S. District Court for the Northern District of Illinois under 42 U.S.C. §§ 1981 & 1983, alleging her dismissal infringed her federal constitutional rights of due process and equal protection and under the First Amendment. The court dismissed her claim, holding that § 1983 and the constitutional provisions she invoked in support of her claim protected only against state, not private discrimination, and that § 1981's protections applied only to race or ethnicity based discrimination. Cite: *Moshi v Bally Corp.*, No. 90 C 788, 1990 U.S. Dist. LEXIS 1838 (N.D. Ill. Feb. 16, 1990)

5. **Rowland v. Mad River Local School District (1983).** Marjorie Rowland worked as a non-tenured high school guidance counselor. She was suspended from her position with pay after she told her colleagues of her bisexuality and disclosed to her secretary the sexual orientation of two students whom she had counseled.

Rowland was not rehired by the school district when her contract expired, and she alleged she was constructively discharged because of her sexual orientation. Rowland challenged her dismissal in federal court, claiming she was deprived of her federal constitutional rights of equal protection of law and freedom of speech in violation of 42 U.S.C. § 1983.

A jury found, inter alia, that: 1) Rowland's firing was at least partially motivated by her statements regarding her bisexuality; 2) these comments did not interfere with her ability to perform her duties or with the operation of the school, and; 3) she had been treated differently than similarly situated heterosexual employees. Based on these findings, the district court found the school district had violated Rowland's constitutional rights of freedom of speech and equal protection.

The Court of Appeals for the Sixth Circuit reversed the lower court's equal protection decision, holding Rowland had not demonstrated her sexual orientation was the sole basis for her discharge and that sufficient justification for her dismissal existed in the jury's finding that the decision not to rehire Rowland was at least partially motivated by her improper disclosure of her students' sexual orientation. It also reversed the district court's holding on freedom of speech, finding that Rowland's statement were private comments to fellow workers, rather than public statements on an issue of public concern, and thus were not constitutionally protected. Cite: *Rowland v Mad River Local Sch. Dist.*, 730 F. 2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

C. Cases Alleging Due Process Violations.

1. Childers v. Dallas Police Department (1981). Steven Childers sought a promotion from his storekeeper's job with the City of Dallas Water Department to a higher level position with the Property Division of the City Police Department. He took the civil service exam for the position twice, scoring higher than any other person on his first attempt and even higher on the second. He was granted interviews with a police official on both occasions and each time his application was denied solely as a result of Childers' admission during the interview that he was gay and participated in gay community activities. Childers challenged the department's refusal to hire him based on his sexual orientation, claiming such refusal violated his federal constitutional rights of freedom of expression and association, due process and equal protection.

The U.S. District Court for the Northern District of Texas acknowledged the infringement of Childers' rights, but found the police department's action was justified by its desire to prevent conflict within the department and to protect its public image, and by concerns over Childers ability to handle evidence from cases involving homosexual conduct. Cite: *Childers v Dallas Police Dept.* 513 F Supp. 134. (N.D. Tex. 1981), *aff'd*, 669 F.2d 732 (5th Cir. 1982).

2. Ashton v. Civiletti (1979). Donald Ashton worked for the FBI for two years in a clerical position. When the Bureau learned Ashton was gay, he was forced to resign to avoid being dismissed for cause. He challenged his constructive dismissal in federal court, claiming the FBI's action violated his federal constitutional right of due process of law because he was terminated without a hearing and because there was no rational basis for the FBI's action.

The district court rejected Ashton's challenge, holding that his property interest in his employment was not sufficient to warrant a hearing prior to dismissal. The U.S. Court of Appeals for the D.C. Circuit reversed and remanded, finding the FBI's treatment of Ashton prior to his dismissal justified his belief that he would be discharged only for a work-related cause. Neither court reached the issue of whether or not the FBI had a rational basis for dismissing Ashton because he was gay. Cite: *Ashton v Civiletti*, 613 F.2d 923 (D.C. Cir. 1979).

D. Cases Alleging Right of Privacy Violations.

1. Walls v. City of Petersburg (1990). Teyonda Walls was an administrator with Petersburg's alternative sentencing program for non-violent criminals. When the program was shifted from the City Manager's Office to the City's Bureau of Police, all employees were required to undergo a security check. Walls refused to answer four questions put to her during her security interview, including one asking whether she had ever had sex with a person of the same sex. She was dismissed from her position as a result.

Walls, an African American, challenged her dismissal in federal court as racially discriminatory based on the argument that African Americans were more likely to respond adversely to the four questions she refused to answer. She based her challenge to the sexual conduct question on the federal constitutional right of privacy and 42 U.S.C. § 1983.

The district court granted summary judgment against Walls on all counts and the U.S. Court of Appeals for the Fourth Circuit affirmed, holding the City had demonstrated a compelling interest in seeking the information requested by each question. Regarding the sexual conduct question, the court held her constitutional right to privacy and § 1983 claims were foreclosed by the Supreme Court's decision in *Bowers v Hardwick*. Cite: *Walls v City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

2. Dawson v. State Law Enforcement Division (1992). Marvin Dawson was forced to resign from his position with the South Carolina State Law Enforcement Division (SLED) after a fellow employee discovered him masturbating in private with her husband. He filed a grievance with a state grievance adjudication committee as required by South Carolina law. The committee found Dawson's termination was based on his alleged attempts to intimidate the fellow employee following the incident. Dawson challenged the decision in the U.S. District Court for South Carolina, claiming his termination was actually because SLED believed he was gay and that this violated his federal constitutional rights of privacy and equal protection.

The court found that even if SLED had terminated Dawson for homosexual conduct, *Bowers v Hardwick* established that the constitutional right to privacy did not extend to such conduct. The court also held that Dawson's equal protection claim failed because his discharge could be justified as rationally related to SLED's need to maintain order, discipline and mutual trust within its organization. Cite: *Dawson v State Law Enforcement Div.*, No. 3:91-1403-17, 1992 U.S. Dist. LEXIS 8862 (D. S.C. April 3, 1992).

E. Cases Alleging Freedom of Association or Freedom of Religion Violations.

1. Shahar v. Bowers (1993). Robin Shahar was a recent law school graduate who applied for and was offered a position with the State of Georgia's Department of Law. When Attorney General Michael Bowers learned that Shahar had engaged in a Jewish marriage ceremony with another woman prior to commencing her position, he ordered the offer of employment withdrawn. Shahar challenged Bower's action in

the U.S. District Court for the Northern District of Georgia, claiming it violated her federal constitutional rights of freedom of association, religion, due process and equal protection.

The district court granted summary judgment to Bowers on all grounds. The court rejected Shahar's freedom of association claim, holding that although Bowers' decision restricted her freedom of association, this restriction was outweighed by the state's interest in not endorsing conflicting interpretations of Georgia law regarding gay and lesbian relationships and conduct and by the department's need to employ attorneys able to exercise discretion and judgment in their personal lives. It applied the same rationale in rejecting her free exercise of religion claim, applying a balancing test of the state's interest versus Shahar's interest. Rejecting Shahar's equal protection claim, the court held Bowers' withdrawal of the offer of employment was motivated by Shahar's actions inconsistent with Georgia law, and that this did not constitute discrimination based on sexual orientation. Finally, the court held Shahar's due process claim was without merit because, except as already noted, Shahar did not allege that a constitutionally protected interest had been infringed. Cite: *Shahar v Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993).

2. Endsley v. Naes (1987). Pat Endsley worked as an unpaid deputy for the Saline County Sheriff's Department in Kansas. Shortly after she began working, rumors began to circulate that she and another female deputy were lesbians. As a result of these rumors and a confrontation with the other woman's husband, Endsley either quit or was told to resign from her position. Endsley sued the County and Sheriff's Department sex [not sexual orientation] discrimination under Title VII. She also claimed her federal and state constitutional rights of freedom of association had been infringed in violation of 42 U.S.C. § 1983.

The district court granted summary judgment against Endsley on all federal claims and dismissed the pendent state claim. In rejecting the Title VII claim, the court held that, if she had been dismissed, it was because of her sexual orientation, not her gender. Rejecting the constitutional and § 1983 claims, the court found that the department would have been justified in dismissing her to protect its internal working relationships and external relationships with the local community. Cite: *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan. 1987).

F. Cases Alleging Freedom of Speech/Expression Violations.

1. Aumiller v. University of Delaware (1977). Richard Aumiller was an openly gay faculty member at the University of Delaware who worked primarily as a director and manager in the University's theater and performing arts division. When Aumiller's contract expired in 1976, the University refused to rehire him because he had voluntarily participated in a series of articles written about gay life in Delaware and at the University. The University feared that Aumiller's advocacy would be detrimental to the University's reputation.

Aumiller challenged the University's decision in federal court on the grounds that it violated his federal constitutional rights of freedom of expression and association. The U.S. District Court for Delaware found that since the University was unable to show that Aumiller's statements were false, adversely affected his performance or disrupted University operations, the decision not to rehire him violated his constitutional right of freedom of expression. The court did not reach the freedom of association claim. The court ordered Aumiller reinstated with back pay and awarded him compensatory damages for emotional distress. Cite: *Aumiller v. Univ. of Delaware*, 434 F. Supp. 1273 (D. Del. 1977).

2. Gish v. Board of Education (1976). John Gish was a high school teacher in Paramus, New Jersey. Seven years after Gish joined the high school he began to assume a prominent leadership position in a statewide gay activist organization. As Gish's activities became increasingly more prominent, the Paramus Board of Education ordered Gish to undergo a psychiatric examination, invoking a New Jersey statute that gave it broad authority to order teachers to under physical and mental examinations. Gish refused, challenging the order as without basis since the board did not allege he had acted improperly in the classroom or toward any student. Gish also challenged the order as violating his rights of freedom of speech, association and due process of law under the federal and New Jersey constitutions.

Gish pursued administrative appeals of the decision through the State Commissioner of Education, then challenged the decision in the Appellate Division of the New Jersey Superior Court. The court rejected his claims, holding the school's responsibility for determining the fitness of teachers outweighed any potential infringement on Gish's freedom of speech or association and that the specific violations of due process he alleged -- his inability to cross-examine two psychiatrists who advised the board that Gish presented a potential mental health risk and the right to an impartial hearing -- were not applicable to the hearings in question since they resulted in no penalty or sanction. *Gish v. Board of Educ. of Paramus*, 366 A.2d 1337 (N. J. Super. Ct. App. Div. 1976), *cert. denied*, 377 A.2d 658 (N.J.), *cert. denied*, 434 U.S. 879 (1987).

3. Acanfora v. Board of Education (1974). Joseph Acanfora was transferred from his position as an eighth grade school teacher to a non-teaching position when his principal discovered he was gay. He challenged his transfer in federal district court, claiming it violated his constitutional rights (none specifically cited) and thus was a violation of 42 U.S.C. § 1983. Acanfora subsequently gave interviews to local and national media representatives regarding his case and his sexual orientation.

The district court found that transferring Acanfora before his sexual orientation became widely known violated his constitutional rights of due process and equal protection. It declined to order his reinstatement, however, holding the school was justified in maintaining him in a position where he would not serve as a potential role model for children once his sexual orientation had become widely known as a result of the case. *Acanfora v. Board of Educ.*, 491 F. Supp. 843 (D. Md. 1973).

The U.S. Court of Appeals for the Fourth Circuit affirmed on different grounds. It found that Acanfora's public statements were protected by his federal constitutional right to freely express his views on a public issue, but that his intentional failure to list his membership in a gay organization on his application for a teaching position was a sufficient basis for his transfer. Cite: *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

II. Cases Brought Under State Constitutions.

A. City of Dallas v. England (1993). Mica England applied for a position with the Dallas Police Department and was invited for an interview. During the interview England was asked about her sexual orientation and she responded she was a lesbian. England was told by the interviewer that police department hiring policy prohibited

the hiring of gay men and lesbians because their conduct violated provisions of the Texas Penal Code that prohibited "deviate sexual intercourse." England challenged the department's hiring policy and the underlying criminal statute in state court, seeking a declaration that they violated her *state* constitutional rights of privacy, due process and equal protection. She also sought an injunction prohibiting the enforcement of the policy and the criminal statute.

Relying on the then valid precedent of *Texas v Morales*, 826 S.W.2d 957 (Tex. App. 1992), (statute outlawing "deviate sexual intercourse" violates gay people's right of privacy under the Texas Constitution), *rev'd, Texas v Morales*, 869 S.W.2d 941 (Tex. 1994) (reversed and remanded with instructions to dismiss on grounds that the case presented a hypothetical controversy which the courts lacked jurisdiction to adjudicate), the trial court granted summary judgment to England on her constitutional claims. The Court of Appeals of Texas rejected the City's appeal and affirmed the lower court's ruling. The Texas Supreme Court dismissed the City's appeal on procedural grounds without reaching the merits of the case. Cite: *City of Dallas v. England*, 846 S.W.2d 957 (Tex. Ct. App. 1993).

B. Merrick v. Board of Higher Education (1992). Harriet Merrick was employed by the State of Oregon's Board of Higher Education. Merrick, a lesbian, sought a judicial declaration regarding the validity of regulations promulgated by the Board which forbid its educational institutions from using sexual orientation as a basis for employment discrimination. Merrick asked the court to determine whether Board's regulations conflicted with a regulation derived from a ballot measure (Measure 8) that forbid any state official from making it impermissible to take a personnel action against a state employee based on sexual orientation. She argued that Measure 8 was itself invalid because it violated the free speech and equal privileges and immunities provisions of the Oregon Constitution and the free speech and equal protection guarantees of the U.S. Constitution.

The Court of Appeals for Oregon first reviewed the regulations in question and determined that an actual conflict existed, then proceeded to an evaluation of the constitutionality of the Measure 8 derived regulation. It held that the sweeping nature of the Measure 8 regulation would have the effect of repressing the speech of gay men and lesbians under the Board's authority as well as their ability to associate with other gay and lesbian people and political groups, and thus was invalid because it violated the Oregon Constitution. None of Merrick's other state and federal constitutional challenges to Measure 8 was reached by the court. Cite: *Merrick v Board of Higher Educ.*, 841 P.2d 646 (Ore. Ct. App. 1992).

III. CASES ALLEGING VIOLATIONS OF FEDERAL STATUTES.

A. CASES BROUGHT UNDER 42 U.S.C. § 2000e (Title VII).

"Title VII to the Civil Rights Act of 1964 prohibits discrimination in employment practices by an employer. Unlike 42 U.S.C. § 1983, it does not require that the discrimination be taken under color of state law or that the discrimination violate a constitutional or federal law. Its protections are extended to a list of enumerated classifications of people, specifically prohibiting employment discrimination based on 'race, color, religion, sex, or national origin.'"

1. Dillon v. Frank (1992). Ernest Dillon worked for the U.S. Postal Service in Michigan. Dillon was subjected to a three year campaign of harassment by his coworkers because they perceived him to be gay, including verbal threats and physical assault. Because his superiors were not able to stem the abusive treatment, Dillon quit his job and filed a sexual harassment claim under Title VII. Dillon also file a state law claim of intentional infliction of emotional distress. The district court dismissed both claims on procedural grounds. It also noted as an independent, substantive basis for its decision that a cause of action could not be stated under Title VII for discrimination based on sexual orientation. The U.S. Court of Appeals for the Sixth Circuit affirmed the decision on all grounds. Addressing the substantive aspect of the Title VII claim, the court held that Dillon had been harassed because he was gay, not because he was a man, and that Title provided no protection against discrimination based on sexual orientation. Cite: *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992).

2. Carreno v. Local Union 226 International Brotherhood of Electronic Workers (1990). J. Carreno was a journeyman electrician and member of Local Union 226 of the International Brotherhood of Electronic Workers (IBEW). In 1987, he quit a job on a construction site and filed a grievance with Local 226, alleging he had been subjected to verbal and physical harassment because of his sexual orientation. After Local 226 failed to consider his charges of harassment, he filed a sexual harassment claim against Local 226 with the Kansas Commission on Civil Rights. The Commission issued a finding that Carreno's complaints lacked probable cause.

Carreno filed suit in the U.S. District Court for Kansas, alleging he was the victim of sexual orientation-based harassment in violation of Title VII and the Kansas Act Against Discrimination (KAD). The court adopted the reasoning of *DeSantis v Pacific Tel & Tel Co., Inc.*, 608 F.2d 327 (9th Cir. 1979) (Title VII prohibits harassment based on sex, not sexual orientation), and rejected Carreno's Title VII claim, finding he was harassed because he was a *gay* male, not because he was a male. It then applied the same reasoning to his KAD claim, holding that Act to be directly analogous to Title VII. Cite: *Carreno v Local Union No. 226, IBEW*, No. 89-4083-S, 1990 U.S. Dist. LEXIS 13817 (D. Kan. 1990).

3. Williamson v. A.G. Edwards & Sons (1989). Darrell Williamson, an African American, was discharged from his position with A.G. Edwards after eight years of service. A.G. Edwards & Sons alleged he was fired for disruptive and inappropriate conduct; Williamson alleged he was discharged for discussing the details of his gay lifestyle at work and that similarly situated white employees were not dismissed. Williamson challenged his dismissal in federal court, claiming he was discriminated against based on his race in violation of Title VII and 42 U.S.C. § 1981.

The district court granted summary judgment to A.G. Edwards, holding that Williamson's evidence indicated he had been discriminated against because he was gay, not because he was African American, and that neither Title VII nor § 1981 prohibited discrimination based on sexual orientation. The U.S. Court of Appeals for the Eighth Circuit affirmed, holding that Williamson had failed to allege sufficient facts to support his contention that similarly situated white gay men were treated differently. Cite: *Williamson v. A.G. Edwards & Son*, 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990).

4. Joyner v. AAA Cooper Transportation (1984). Timothy Joyner, presumably a heterosexual man, worked as a mechanic for AAA Cooper Transportation (AAA). He complained to the company's chairman after a

management level male employee allegedly made a sexual advance toward him. Joyner was eventually promoted to a position as a driver and was transferred, over his objections, to a division in which the other employee was his direct supervisor. Joyner lost all seniority with the transfer and was eventually laid off during an economic slowdown. AAA eventually hired new drivers and rehired all other drivers laid off when Joyner was laid off, but claimed that business was too slow to rehire him.

Joyner filed a charge of sex discrimination against AAA with the Equal Employment Opportunity Commission (EEOC). The EEOC held there was no probable cause to believe Joyner's charges were valid. Joyner then sued AAA in the U.S. District Court for the Middle District of Alabama, claiming AAA's actions violated Title VII. The court held Joyner's supervisor would not have sexually harassed him if he were not male, therefore he had discriminated against him based on his gender, in violation of Title VII. Cite: *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984).

5. Wright v. Methodist Youth Services (1981). Donald Wright was terminated after working for three years for Methodist Youth Services (MYS), a private, nonprofit corporation providing social services for minors in the State of Illinois. Wright alleged his termination was the result of his refusal of his boss's homosexual advances towards him. Wright sued in the U.S. District Court for the Northern District of Illinois, claiming his discharge violated Title VII and 42 U.S. C. §§ 1983 & 1985.

The court refused to grant a motion to dismiss Wright's Title VII claim. It reasoned that Wright sufficiently stated a gender-based discrimination claim since the specific discrimination he alleged would not have been directed at him if he were a female.

The court dismissed Wright's claim that his Fourteenth Amendment rights under the federal constitution were infringed in violation of § 1983, holding that MYS's links with the state were not sufficient to qualify its actions as having been taken under the color of state law. It also dismissed the § 1985 claim, holding that the substance of the alleged discrimination was based on the Fourteenth Amendment, which also requires state action. Cite: *Wright v. Methodist Youth Serv.*, 511 F. Supp. 307 (N.D. Ill. 1981).

6. DeSantis v. Pacific Telephone and Telegraph (1979). *DeSantis* consolidated four cases involving claims of employment discrimination by gay and lesbian employees who had been dismissed from private companies when their supervisors learned of their sexual orientation. All challenged the legality of their dismissals in federal district court, arguing the dismissals violated Title VII and 42 U.S.C. §1985.

The district courts dismissed all claims in each case, primarily for failure to state a claim upon which relief could be granted. The U.S. Court of Appeals for the Ninth Circuit affirmed. It rejected the Title VII claims, holding Title VII's protections extended only to the classes of people enumerated within the law and that since sexual orientation was not expressly mentioned, Title VII did not prohibit such discrimination. The court also rejected the § 1985 claim, holding that gay people did not constitute a federally protected class for purposes of § 1985. Cite: *DeSantis v. Pacific Tel. and Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

B. Cases Brought Under 42 U.S.C. § 1983 and Other Federal Statutes.

Originally enacted as the Civil Rights Act of 1871, 42 U.S.C. § 1983 allows an action to be brought whenever an individual is deprived under the color of state law of "any rights, privileges or immunities secured by the Constitution and laws." Because its prohibition against the deprivation of an individual's civil rights is broad, compared to other civil rights provisions, § 1983 is frequently relied upon in employment discrimination cases based on sexual orientation. Its scope is circumscribed, however, by the fact that a valid § 1983 claim requires a violation of a constitutional or statutory right action taken under the color of state law.

In addition to cases brought under 42 U.S.C. § 1983 and Title VII, other statutory challenges have been brought under 42 U.S.C. §§ 1981 & 1985(3). Neither of these statutory provisions require a state action. Section 1981 was originally passed to provide slaves with the same legal rights as "white citizens" and provides generally that "all persons" within the U.S. are entitled to the "full and equal benefits of all laws." Despite this broad language, § 1981 has been judicially construed as prohibiting only discrimination based on race or ethnicity. Section 1985(3) was originally passed in 1861 for similar purposes as § 1981. It prohibits two or more individuals from conspiring to deprive "any person or class of persons of the equal protection of the laws." Section 1985(3), unlike § 1981, protects against invidious discrimination based on classifications of persons by non-racial characteristics, as well as race.

Some cases, primarily security federal civil service and security clearance related cases, also have been challenged as violations of the Administrative Procedure Act (APA), which requires that federal employment related decisions not be arbitrary, capricious or unconstitutional.

All claims brought under these federal laws are summarized in the federal constitutional, Title VII, Civil Service, security clearance, or prisoner cases sections.

IV. Cases Brought Under State/Municipal Statutes.

A. Hanke v. Safari Hair Adventure (1994). Raymond Hanke quit his job as a hair stylist at Safari Hair Adventure after his supervisor indicated he would do nothing to stop a managerial level employee from subjecting Hanke to homophobic remarks. His subsequent application for unemployment compensation was turned down by the Minnesota Commission on Jobs and Training (MCJT) on the grounds he did not demonstrate good cause for quitting. Hanke challenged the commission's decision in the Minnesota Court of Appeals. The court held that harassment based on sexual orientation provided sufficient cause for quitting one's job under Minnesota law (specific statute/regulation not specified) and ordered that Hanke not be disqualified from receiving unemployment compensation. Cite *Hanke v. Safari Hair Adventure*, 512 N.W.2d 614 (Minn. Ct. App. 1994).

B. Smedley v. Capps, Staples, Ward, Hastings and Dodson (1993). Lauren Smedley worked as an associate with the law firm of Capps et al. After Smedley was hired, the firm learned she was a lesbian. Her supervisor told her the firm did not like employees to bring political or controversial issues into the office and that therefore she should not discuss her sexual orientation with clients or at firm social events. Smedley was discharged from her position shortly after she was quoted in a local news article that identified her firm and the fact that she was a lesbian.

Smedley challenged the firm's policy and her dismissal as illegal under § 1101 of the California Labor Code, which prohibits employers from preventing employees from engaging in politics. The U.S. District Court for the

Northern District of California denied cross-motions for summary judgement, holding that genuine disputes of material facts existed as to why Smedley was fired and whether or not the firm's alleged policy violated § 1101. Cite: *Smedley v Capps, Staples, Ward, Hastings, & Dodson*, 820 F. Supp. 1227 (N.D. Cal. 1993).

C. Mogilefsky v. Superior Court of Los Angeles County (1993). Wayne Mogilefsky worked as a creative editor for Silver Pictures, a subsidiary of Warner Bros. Mogilefsky alleged his employer, Joel Silver, propositioned him on several occasions and that he was told by fellow employees that previous employees had been fired for not acceding to Silver's overtures. Mogilefsky sued Silver, Silver Pictures and Warner Bros., claiming that he was sexually harassed and discriminated against in violation of California's Fair Employment and Housing Act (FEHA). The Superior Court of Los Angeles County dismissed the sexual harassment claim, holding Mogilefsky had not stated a cognizable claim. The Court of Appeals for California vacated the Superior Court's order and directed it to consider Mogilefsky's sexual harassment claim. It held Mogilefsky had stated a cognizable claims of quid pro quo (sex demanded as a condition of employment) and hostile environment sexual harassment under the FEHA, even though the FEHA did not explicitly address same-sex sexual harassment. Cite: *Mogilefsky v. Superior Court*, 20 Cal. App. 4th (1993).

D. Delaney v. Superior Fast Freight (1993). Jim Delaney was fired from his position with Superior Fast Freight (SFF), allegedly for threatening his supervisor and two coworkers. He subsequently sued on multiple counts in federal and state court, including a state court claim that he was discriminated against based on his sexual orientation in violation of California state law. His original complaint failed to allege a violation under the provision of California's Labor Code that prohibits employment discrimination based on sexual orientation, and the trial court denied his request to amend his complaint. The court then granted summary judgment to SFF on the grounds that the Los Angeles municipal ordinance cited in his complaint in support of his discrimination claim had been preempted by California's Fair Employment and Housing Act, which it construed as not banning employment discrimination based on sexual orientation. The California Court of Appeal reversed the trial court's decision and remanded the case for further proceedings, holding the lower court had erred in not allowing Delaney to amend his complaint to include the count based on the Labor Code. Cite: *Delaney v Superior Fast Freight*, 14 Cal App. 4th 590 (1993).

E. Wortman v. Philadelphia Commission on Human Relations (1991). James Wortman filed a complaint with the Philadelphia Commission on Human Relations (PCHR), alleging he had been fired from his job because of his sexual orientation in violation of Philadelphia municipal law. The Commission investigated Wortman's complaint and informed him by letter it had been dismissed as unsubstantiated. Wortman appealed PCHR's decision to the Court of Common Pleas of Philadelphia County, which held his appeal was precluded by a regulation that prohibited appeals of a PCHR determination that a complaint is unsubstantiated. The Commonwealth Court of Pennsylvania remanded the case, holding Philadelphia municipal law permitted appeals of PCHR dismissals of claims. Cite: *Wortman v. Commission on Human Relations*, 591 A.2d 331 (Pa. Commw. Ct. 1991).

F. Gay Law Students Association v. Pacific Telephone and Telegraph Co. (1979). Gay Law Students, joined by four individuals and another pro-gay rights organization, brought this class action under California law seeking to enjoin Pacific Telephone and Telegraph (PT&T) from discriminating against gay men and lesbians in its employment practices. The suit also sought an injunction requiring the California Fair Employment Practice Commission (FEPC) to act upon complaints of employment discrimination based on sexual orientation brought under the California Fair Employment Practice Act (FEPA).

The trial court ruled against Gay Law Students on both counts, holding that neither the FEPA nor the California Constitution could be construed as prohibiting sexual orientation discrimination in employment. The California Supreme Court affirmed the ruling as it applied to the FEPC, holding that since the FEPA did not include sexual orientation among its enumerated categories of individuals protected against employment discrimination, it could not be construed as prohibiting employment discrimination based on sexual orientation. It reversed the lower court's ruling as it applied to PT&T, however, holding the equal protection clause of the California Constitution, the California Public Utilities Code and the California Labor Code all prohibited arbitrary employment discrimination by a public utility. Cite: *Gay Law Students Assn. v Pacific Tel & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

G. Gaylord v. Tacoma School District No. 10 (1977). James Gaylord was a teacher in Tacoma, Washington for twelve years. During that time he consistently received favorable evaluations of his work. When a school official eventually questioned him regarding his sexual orientation, James freely admitted he was gay. Within a month he was fired from his teaching position on the basis of the school district's policy of providing for the discharge of employees for "immoral" conduct. Washington's Supreme Court upheld the discharge, holding the school district was justified in finding that homosexuality was immoral and that public knowledge of James' status impaired his efficiency as a teacher. Cite: *Gaylord v Tacoma Sch Dist. No. 10*, 559 P.2d 1340 (Wash.), *cert. denied*, 434 U.S. 879 (1977).

V. Cases brought under State Contract, Tort or other causes of action.

A. Hicks v. Arthur (1994). Schree Hicks challenged the termination of her employment with Resources for Human Development, Inc. on multiple grounds, including that she was wrongfully discharged based on her sexual orientation. The U.S. District Court for the Eastern District of Pennsylvania dismissed the sexual orientation related claim, holding Hicks was an employee at will and had failed to demonstrate a clearly mandated public policy rationale supporting a sexual orientation exception to the employment at will doctrine. Cite: *Hicks v. Arthur*, 843 F.Supp 949 (E.D. Penn. 1994).

B. Joffe v. Vaughn (1993). Clayton Vaughn worked for KOTV in Oklahoma, first as a television reporter, then as evening news coanchor. He was fired from his position after KOTV conducted a cursory investigation into an allegation made by his co-anchor's male hair dresser that the hair dresser and Vaughn had a sexual encounter. Vaughn sued KOTV, several of its officials and the hair dresser in state court, alleging wrongful discharge, slander, tortious interference with his contract and intentional infliction of emotional distress. Vaughn subsequently committed suicide. Vaughn's wife, representing his estate, pursued the claim. Only the intentional infliction of emotional distress claim survived Vaughn's death. The jury found for Vaughn's estate, awarding a total of $4,000,000 in actual and punitive damages. The Court of Appeals of Oklahoma upheld both the verdict

and the damages awarded. Cite: *Joffe v. Vaughn*, No. 79,505, 1993 Okla. Civ. App. LEXIS 192; 62 O.B.A.J. 1651 (Okla. Ct. App. Oct. 26, 1993).

C. Collins v. Shell Oil Company (1991). Jeffery Collins was a top level management employee for Shell Oil Company. Through various company statements, personnel policies and practices, Shell repeatedly assured its employees that they would be dismissed only for good cause. Under California law these assurances were binding as an implied contract. When Collins' secretary provided his supervisor with a personal document inadvertently left by Collins' in his office that indicated he was gay, the supervisor and other Shell management personnel decided to terminate him. Because they lacked good cause, Collins' supervisors fabricated an ad hoc negative evaluation which, without warning, they place in his personnel record. They then dismissed him for allegedly failing to adequately perform his duties, despite nineteen years of positive work evaluations. Collins sued Shell on his contract and for intentional infliction of emotional distress. The Appellate Department, Superior Court for Alameda County, California found Collins' supervisors fired him solely because of his sexual orientation, and awarded him a combined total of $5,323,299 on his contract and tort claims. Shell appealed, but eventually settled out of court. *Collins v. Shell Oil Co.*, 60 U.S.L.W. 2092 (Cal. App. Dept. Super Ct., June 13, 1991).

VI. Civil Service Commission Cases.

Until the mid-1970's the Civil Service Commission permitted the discharge of gay and lesbian civil service employees because their conduct was deemed to violate Civil Service Regulations that made "immoral" conduct grounds for dismissal. Subsequent to the *Singer* case summarized below, those regulations were changed and "immoral" conduct was excised from the list of actions that provide grounds for dismissal. Although Chapter 731 of the Federal Personnel Manual still provides that a person may be dismissed for "criminal . . . infamous or notoriously disgraceful conduct" these terms are no longer construed as allowing dismissal for private homosexual conduct. As a result, the line of cases involving dismissals from civil service positions because of sexual orientation ends in the mid-1970's.

A. Singer v. United States Civil Service Commission (1976). John Singer was hired as a clerk in the Seattle office of the EEOC. Although no complaint was made regarding his conduct at work or the performance of his job, his openness about his sexual orientation and his participation in various gay community and media activities resulted in his dismissal. Singer challenged his dismissal first within the Civil Service Commission, then in federal court, claiming it violated his federal constitutional rights of freedom of expression and due process of law. The district court granted summary judgment to the Commission.

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's order, holding that the government's desire to promote the efficiency and protect the public image of the EEOC and the Civil Service provided a rational basis for the Commission's actions. *Singer v. United States Civ. Serv. Commn.*, 530 F.2d 247 (9th Cir. 1976) *vacated*, 429 U.S. 1034 (1977) (vacated at request of Solicitor General after Civil Service Commission changed the regulation which authorized discrimination based on sexual orientation).

B. Society for Individual Rights v. Hampton (1975). Donald Hickerson was discharged from his clerical position with the Department of Agriculture when it discovered that he had previously been discharged from the Army because he was gay. The Society for Individual Rights and Hickerson challenged the Civil Service Commission's policy of excluding all individuals who had engaged or solicited others to engage in homosexual conduct, both on the behalf of Hickerson and as a class action.

The U.S. District Court for the Northern District of California granted summary judgment to the Society and Hickerson and enjoined the Civil Service Commission from enforcing a blanket policy of excluding gay people. In doing so, it held that the Commission's policy was arbitrary, capricious and lacking a rational basis as required by the federal constitutional guarantee of due process of law. It rejected the Commission's argument that the blanket policy was rationally related to a legitimate government interest in protecting the efficiency of the service from being brought into public disrepute by being associated with homosexual conduct. The court left open the possibility of applying of this rationale in individual cases if an actual impairment could be demonstrated. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision not to grant retroactive relief on the class action, but expressed no opinion on the district court's core holding. Cite: *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905 (9th Cir. 1975). **C. Baker v. Hampton (1973).** Charles Baker was discharged from his federal civil service clerical position with the National Bureau of Standards for refusing to answer questions regarding his sexual orientation. Baker and another individual who was not rehired to a similar position for the same reason challenged their dismissals in the U.S. District Court for D.C. The court found that the Civil Service Commission had failed to establish a rational relationship between the questions and the ability of Baker and Rau to perform their duties and ordered the plaintiffs reinstated to their positions with back pay. Cite: *Baker v. Hampton*, 6 Empl. Prac. Dec. P9043 (D. D.C. 1973).

C. Dew v. Halaby (1962). William Dew worked as an air traffic controller for the Civil Aeronautics Authority (CAA). When the CAA learned that a previous employer had dismissed Dew because he had admitted teenage homosexual conduct and experimentation with marihuana, it dismissed Dew pursuant to Civil Service Commission regulations allowing an individual to be discharged for "criminal, infamous, dishonest, immoral or notoriously disgraceful conduct" where such a dismissal would promote the efficiency of the service. Dew challenged his dismissal, primarily on the grounds that his dismissal for pre-employment conduct was arbitrary and capricious and thus violated the APA. The U.S. District Court for D.C. upheld the Commission's dismissal of Dew. The U.S. Court of Appeals for the D.C. Circuit affirmed the decision, finding that dismissal for pre-employment conduct could not be said to be either arbitrary or capricious and thus the Commission was justified in finding that retaining Dew would adversely affect the efficiency of the service. Cite: *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1962), *cert. dismissed*, 379 U.S. 951 (1964).

VII. Cases Involving Revocation or Denial of a Government Security Clearance.

A. Buttino v. Federal Bureau of Investigation (1992). Frank Buttino was released from his position as a special agent for the FBI after he admitted he was gay during a security investigation. The Bureau claimed Buttino was deceptive and uncooperative in his investigation and thus was a security risk -- despite twenty years of service in sensitive positions. Buttino challenged his dismissal in federal court, alleging that the FBI's justification was merely a pretext for discriminating against him because of his sexual orientation in violation of his federal

constitutional rights of freedom of expression and association, due process and equal protection of law.

The U.S. District Court for the Northern District of California granted summary judgment to the FBI on the due process claim because Ninth Circuit precedent, *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1104 (1991), precluded due process challenges of security clearance revocations. It also granted summary judgment against Buttino on the freedom of expression and association claims because he failed to litigate them. Summary judgment on the equal protection claim was denied on the grounds that triable issues of fact remained as to whether Buttino's sexual orientation was the basis for his discharge and, if it was, whether there was a rational basis for FBI employment discrimination against gay people holding sensitive positions. The case eventually settled out of court. *Buttino v. FBI*, 801 F. Supp. 298 (N.D. Cal. 1992).

B. **Doe v. Gates (1992).** John Doe worked for the Central Intelligence Agency (CIA) for nine years, first as a clerk-typist, then as an electronics technician. During this time he was consistently rated as an excellent or outstanding employee. When he voluntarily informed a security officer that he was gay, the CIA placed him on administrative leave and began a security investigation. He voluntarily submitted to a polygraph examination and was told by the polygrapher that the test indicated he had not engaged in sexual relations with foreign nationals or divulged classified information to a sexual partner. Despite this result, Doe eventually was told that his sexual orientation made him a security risk and he was discharged from his position by direction of the Director of the CIA acting under the authority granted him by the National Security Act of 1947 to terminate an employee whenever he deemed it necessary or in the interests of the United States.

Doe challenged his dismissal in the U.S. District Court for D.C., charging that it violated CIA regulations, the APA and his federal constitutional rights to privacy, due process and equal protection of law. The district court ordered Doe reinstated to administrative leave status, holding that dismissing Doe without explaining why his sexual orientation posed a security threat violated procedural guarantees contained in both CIA regulations and the APA (*Doe v. Casey I*, (1985)).

The U.S. Court of Appeals for the D.C. Circuit reversed the district court's order and ordered the case remanded for further proceedings. It held that although no CIA regulation prohibited the Director from discharging Doe without providing a reason, the lack of a stated reason or a finding by the district court regarding the Director's reason precluded the appellate court from determining if the Director acted arbitrarily and capriciously in violation of the APA (*Doe v. Casey II*, (1986)).

The Supreme Court declined to affirm the appellate court's holding, reasoning that the National Security Act committed the discharge of CIA employees for security reasons to the Director alone, immune from judicial review except for legitimate constitutional claims. It then remanded the case for consideration of Doe's allegations that his federal constitutional rights were violated (*Webster v. Doe*, (1988)).

On remand, the district court rejected Doe's equal protection argument, reasoning that since gay people were subject to coercion and were frequently targeted by foreign intelligence services, the CIA's action were justified by its need to protect legitimate government security interests. It found for Doe on his due process claim, however, finding that a failure to list homosexuality as a dischargeable offense in its regulations or its employee handbook provided Doe with a legitimate property interest in his job that could not be terminated without a hearing. The right to privacy claim was not adjudicated due to Doe's failure to litigate. (*Doe v. Webster*, (1991)).

The circuit court once again reversed the district court, reasoning that there was no cognizable due process violation because Section 102(c) of the National Security Act precluded the creation of a legitimate property interest in employment in Doe by CIA regulations or employee procedures. It also found that Doe had failed to adequately demonstrate that the CIA had a blanket policy of discharging gay people and therefore no viable constitutional equal protection claim existed. Cite: *Doe v. Gates*, 981 F.2d 1316 (D.C. Cir. 1992), *cert. denied*, 114 S. Ct. 337 (1993).

C. **United States Information Agency v. Krc (1992).** Jan Krc had a limited Foreign Service appointment with the United States Information Agency (USIA) and was assigned to work in Yugoslavia. During his post-tour security debriefing it was established that he had engaged in homosexual conduct with a military attache from a non-NATO European country and with two nationals from a communist country. The USIA terminated Krc's foreign service appointment when its Director of Security disapproved him for further foreign assignments on the grounds that Krc's lack of judgment made him a security risk. Krc challenged the USIA's action with the Foreign Service Grievance Board, which ordered him reinstated. The USIA then brought this action in federal court, seeking to set aside the board's order. Krc counterclaimed, challenging the USIA's refusal to carry out the order as violating his federal constitutional right of due process and equal protection and as being arbitrary and capricious in violation of the APA.

The U.S. District Court for D.C. found that the grievance board lacked the authority to adjudicate Krc's complaint and granted the USIA's motion to set aside the board's order. The court dismissed Krc's APA-based claim, holding that the Foreign Service Act under which he was dismissed reserved the power to revoke limited Foreign Service appointments for security reasons to the Secretary of State in a manner which precluded judicial review for non-constitutional claims. It also held that the USIA had provided Krc with due process, but that even if it had not, his expectation of continued employment had not been infringed in a way that presented a constitutionally cognizable claim because Krc had been transferred to the domestic civil service at a higher salary.

The Court of Appeals for the D.C. Circuit affirmed, but remanded the case with instructions for the district court to consider Krc's equal protection claim and a related tort claim that the USIA had interfered with Krc's attempts to gain employment at another government agency.

On remand, the district court found that Krc had not been denied equal protection. The court found the reason he had been dismissed was the security risk posed by the indiscriminate nature of his conduct, not the gender of his partners. It also dismissed his tortious interference with employment claim, holding that the USIA had done no more than respond truthfully to the other agency's legitimate query for information relevant to its security check on Krc. The Court of Appeals affirmed. Cite: *United States Info. Agency v. Krc*, 989 F.2d 1211 (D.C. Cir. 1993).

D. **High Tech Gays v. Defense Industrial Security Clearance Office (1990).** High Tech Gays brought this action on behalf of three gay men who worked for defense contractors. All three had been denied Secret or Top Secret industrial security clearances because of their sexual orientation. High Tech alleged that the respondents (DISCO) automatically subjected gay and lesbian applicants to expanded security investigations and frequently

rejected their applications because DOD security regulations defined homosexual conduct as "deviant" sexual behavior that rendered an individual susceptible to coercion or blackmail. High Tech challenged these policies as violating gay individuals' federal constitutional rights of equal protection, due process and freedom of association.

The U.S. District Court for the Northern District of California granted summary judgement for High Tech Gays on its equal protection and freedom of association claims. The court held gay people constituted a frequently discriminated against "quasi-suspect" class of people who had a fundamental right to engage in homosexual activity, except sodomy per *Bowers v. Hardwick*. The court found DISCO's policies were based on irrational prejudice and outmoded stereotypes which were not even rationally related to a legitimate government interest. The court rejected DISCO's arguments that homosexual activity: 1) was criminal conduct; 2) was indicative of heightened potential for emotional instability; 3) rendered gays and lesbians subject to blackmail or coercion. The court rejected High Tech's due process claim, interpreting it as a procedural due process claim which failed because applicants for clearances were given a sufficient opportunity to argue and appeal their decisions administratively.

The U.S. Court of Appeals for the Ninth Circuit reversed the district court and ordered that summary judgement be granted against High Tech Gays. It held that gay people did not meet all the criteria required to be considered a quasi-suspect class since the court considered being gay to be a behavioral rather than immutable characteristic and because it found gay people were not politically powerless. It further held the evidence presented by the government that foreign intelligence services targeted gay individuals provided a rational basis for automatically requiring expanded security investigations of gay and lesbian applicants. Cite: *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

E. Dubbs v. Central Intelligence Agency (1990) Julie Dubbs was an open lesbian working for a defense contractor. Dubb's employer requested her security clearance be upgraded so she might have access to highly classified intelligence information. This request was turned down by the Central Intelligence Agency (CIA) on the grounds that Dubbs' failure to disclose her sexual orientation in previous security investigations indicated a perception of vulnerability and a practice of deception that made her a security risk. Dubbs challenged the decision in federal court, alleging the CIA employed a blanket policy of considering homosexual conduct to be either a disqualifying or negative factor in evaluating clearance requests, and that this violated the APA as well as her federal constitutional rights to freedom of association, due process and equal protection of law.

The district court granted summary judgment to the CIA on all counts, holding Dubbs' evidence did not present a triable issue of fact as to whether the CIA had such a blanket policy, and that the provisions of the APA did not apply to CIA decisions regarding security clearances.

The U.S. Circuit Court of Appeals for the Ninth Circuit reversed and remanded, finding that Dubbs had presented sufficient evidence of a potentially unconstitutional blanket CIA policy discriminating against gay people in granting security clearances to survive summary judgment. The court affirmed the district court's ruling that the APA's arbitrary and capricious standard did not apply to CIA security clearance decisions, holding the authority to make these decisions had been statutorily committed to the CIA's discretion by executive order (Executive Order 10865) and therefore its decisions could only be reviewed for constitutional claims.

On remand, Dubbs' amended her complaint to charge: 1) the CIA's alleged blanket policy violated its own procedures for reviewing clearance applications and thus its decision was arbitrary and capricious in violation of the APA; and; 2) the policy violated her constitutional right to equal protection and freedom of association. The court dismissed the APA claim, holding the CIA acted in accordance with its regulations and that the appellate court's opinion foreclosed the question of whether those regulations could be reviewed judicially on a non-constitutional claim. The court rejected a motion to dismiss the constitutional claims, holding that as a matter of law they had stated a claim upon which relief could be based and therefore should be allowed to proceed. Cite: *Dubbs v. CIA*, 769 F. Supp. 1113 (N.D. Cal. 1990).

F. Doe v. Cheney (1989) John Doe was a cryptographic material control technician with the National Security Agency (NSA) for sixteen years. His Top Secret intelligence clearance was revoked and he was dismissed for cause after he admitted in a security interview that he had engaged in gay relationships with foreign nationals during that time. He was not provided an administrative hearing at which he could challenge the grounds for his dismissal, but he was allowed to appeal his decision to an NSA board of review and the Director of the NSA. The board and the Director both affirmed his dismissal on the grounds that his liaisons with foreign nationals, not his sexual orientation, rendered him a security risk. Doe challenged the dismissal in federal court, claiming that it violated NSA regulations requiring that employees dismissed for national security reasons be provided a hearing, as well as his federal constitutional rights of due process and equal protection.

The U.S. District Court for D.C. rejected Doe's claims, holding that it was within NSA's discretion to pursue either its routine dismissal procedures, as it did with Doe, rather than its power to dismiss an employee summarily for national security reasons. It also held that even if the agency had dismissed Doe solely because of his sexual orientation, the dismissal would be rationally related to a legitimate government interest in maintaining national security (*Doe v. Weinberger*).

The U.S. Court of Appeals for the D.C. Circuit reversed, holding that federal law (5 U.S.C. § 7532) required that an NSA employee dismissed for security reasons first be given an impartial hearing to review and challenge the charges, unless a specific determination by the Secretary of Defense found that such a hearing would be detrimental to national security.

The Supreme Court reversed the appellate court, holding that § 7532 was a discretionary removal procedure which was not required since Doe was dismissed under ordinary rather than summary dismissal procedures. It remanded the case for consideration of Doe's constitutional claim as well as whether NSA had violated its own regulations (*Curlucci v. Doe*).

On remand, the appellate court found that Doe's termination had been in accordance with NSA's regulations and that the procedures followed in terminating DOE had been sufficient to demonstrate that his claim that his dismissal violated his right not to be deprived of property or liberty without due process of law was without merit. The court further found that since Doe failed to demonstrate he was terminated because of his sexual orientation rather than because of his unauthorized liaisons with foreign nationals, his equal protection claim need not be reached. Cite, *Doe v. Cheney*, 885 F.2d 898 (D.C. Cir. 1989).

G. Gayer v. Schlesinger (1973). This case consolidated government appeals of three cases in which the U.S. District Court for D.C. set aside the Department of Defense's (DOD) revocation of industrial security clearances granted to three defense contractor employees. Each revocation was based on a DOD directive issued pursuant to Executive Order 10865, which granted the DOD authority to grant security clearances when doing so would be clearly consistent with the national interest.

In the first case (*Wentworth v Schlesinger*), Wentworth had admitted he was gay and submitted to an extensive series of questions regarding intimate details of his private life. An administrative hearing board approved the withdrawal of his clearance, relying on a provision of the DOD directive that made any conduct that made an individual likely to be subject to coercion a relevant criterion in evaluating the individual's suitability for a clearance. The district court granted summary judgment to Wentworth, ruling the board relied solely on his admission and had failed to present any evidence that he was susceptible to coercion or blackmail. It also held that the scope of the questions violated Wentworth's federal constitutional right of privacy.

The U.S. Court of Appeals for the D.C. Circuit affirmed in part, holding the scope of the questions violated both the executive order, which it interpreted as prohibiting unnecessarily intrusive questions, and Wentworth's right of privacy. It remanded his case for further, less intrusive administrative proceedings. The court declined to consider the issue of whether or not a blanket policy of excluding gay people could be imposed, but suggested the relationship between sexual orientation and the potential for blackmail or disruption of the efficiency of the organization could justify denial of a security clearance in individual cases.

The second and third cases (*Gayer v Schlesinger* and *Ulrich v Schlesinger*) involved slightly different circumstances. Gayer and Ulrich admitted they were gay, but refused to answer detailed questions similar to those answered by Wentworth. Both of their clearances were revoked under a provision of the DOD directive that made failure to cooperate in a security investigation cause for revocation. In both cases, the district court found that since Gayer and Ulrich had admitted they were gay, additional questioning about their sexual orientation and conduct violated their federal constitutional right of privacy and ordered the suspension of their clearances set aside.

The appellate court affirmed the decision with respect to Ulrich, holding that although further questioning relevant to the issue of whether he presented a security risk was permissible, the scope of the questions presented to him violated the executive order and his right of privacy. It reversed the district court's reinstatement of Gayer, finding that his refusal to answer a second, modified set of less intrusive questions was unjustified. The court remanded his case for further administrative proceedings so that he might be given an opportunity to respond. Cite: *Gayer v Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973).

H. Adams v. Laird (1969). Robert Adams worked as an electronics technician at a defense contractor. At the instigation of his employer he applied for an upgrade of his industrial security clearance from Secret to Top Secret. The ensuing security investigation revealed Adams was gay. Adams application for an upgraded security clearance was denied and his existing clearance was suspended. Adams challenged the decision in the U.S. District Court for D.C., claiming that his federal constitutional right to due process of law was violated. The court rejected Adams' claim and granted summary judgment to the government. The U.S. Court of Appeals for the D.C. Circuit affirmed the district court's order, holding there was a rational basis for linking being gay with the potential for security problems and thus the denial of the clearance was constitutionally permissible. Cite: *Adams v Laird*, 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

VIII. PRISONER CASES.

A. Kelley v. Vaughn (1991). Richard Kelley was a prisoner at the Western Missouri Correctional Center. He brought this action challenging his dismissal from his job in the bakery at the Center, claiming that he was removed solely because he was gay. In an opinion reviewing the sufficiency of Kelley's pro se complaint, the U.S. District Court for the Western District of Missouri interpreted his complaint as alleging violations of Title VII and his federal constitutional rights of due process and equal protection. The court dismissed the Title VII and due process challenges, holding that judicial consensus had established Title VII did not protect against discrimination based on sexual orientation and that, as a prisoner, Kelley had no constitutionally protected interest in a particular job upon which to base a due process claim. The court held he had sufficiently alleged a claim of arbitrary discrimination to warrant fuller consideration of his equal protection claim and allowed his case to proceed. Cite: *Kelley v Vaughn*, 760 F. Supp. 161 (W.D. Mo. 1991).

B. Johnson v. Knable (1991). Steven Johnson was a prisoner at the Maryland Correctional Institute (MCI). He sue MCI and several of its officials in federal court, claiming he had been discriminated against in violation of § 1983 because he was denied a prison job because he was gay. The district court initially dismissed the case as frivolous, but was reversed by the U.S. Circuit Court of Appeals for the Fourth Circuit in an unpublished opinion holding Johnson had alleged a potentially cognizable claim that his federal constitutional right of equal protection had been violated. The case was remanded and the district court adopted a magistrate's evidentiary report and recommendation which found MCI had not discriminated against Johnson based on his sexual orientation. The Fourth Circuit again reversed the district court, holding the district court had improperly failed to conduct a de novo review of the magistrate's decision after it was objected to by Johnson. Cite: *Johnson v Knable*, No. 90-7388, 1991 U.S. App. LEXIS 12125 (4th Cir. May 28, 1991).

C. Bush v. Potter (1989). Ray Bush, a prisoner in a Tennessee state work camp, sued the job coordinator and head kitchen steward at his camp, claiming they violated his federal constitutional rights by firing him from his job in the camp's kitchen because he was gay. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of Bush's claim, holding that prison inmates have no constitutionally protected right to a particular prison job. *Bush v Potter*, 875 F.2d 862 (6th Cir. 1989).

IX. UNANALYZED CASES.

The following cases have been cursorily reviewed, but have not yet been fully analyzed for this study:

Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), *cert. denied*, 393 U.S. 1041 (1969).

Iranoff v. Bryan, 569 A.2d 466 (Vt. 1989).

Board of Educ. v. Morales Calderon, 35 Cal. App. 3d 490 (1973), *appeal dismissed* and *cert. denied*, 419 U.S. 807 (1974).

Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979).
Governing Bd. v. Metcalf, 36 Cal. App. 3d 546 (1974).
Hart v. National Mortg. & Land Co., 189 Cal. App. 3d 1240 (1987).
Joachim v. American Tel. & Tel. Info. Sys., 793 F.2d 113 (5th Cir. 1986).
M.A.E. v. Doe, 566 A.2d 285 (Pa. Super Ct. 1989)
Lyde v. City of Akron, 729 F.2d 1461 (6th Cir. 1984).
Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985).
Manale v. Roussel, No. 87-2694, 1988 U.S. Dist. LEXIS 9744 (E.D. La. Aug. 29, 1988).
Marks v. Schlesinger, 384 F. Supp. 1373 (C.D. Cal. 1974).
McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).
McKeand v. Laird, 490 F.2d 1262 (9th Cir. 1973).
Morrison v. Board of Educ., 461 P.2d 375 (Cal. 1969).
Moser v. Board of Educ., 22 Cal. App. 3d 988 (1972).
Naragon v. Wharton, 737 F.2d 1403 (5th Cir. 1984).
National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 470 U.S. 904 (1984) (per curiam).
Newman v. District of Columbia, 518 A.2d 698 (D.C. 1986).
Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).
Padula v. Webster, 822 F.2d 97 (D. D.C. 1987).
Polly v. Houston Lighting & Power Co., 825 F. Supp. 135 (S.D. Tex. 1993)
Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981).
Richardson v. Hampton, 345 F. Supp. 600 (D. D.C. 1972)
Safransky v. Personnel Bd., 215 N.W.2d 379 (Wis. 1974).
Sarac v. Board of Educ., 249 Cal. App. 2d 58 (1967).
Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970).
Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1964).
Scott v. Macy, 402 F.2d 644 (D.C. Cir 1968).
Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1979).
Swift v. United States, 649 F. Supp. 596 (D. D.C. 1986).
Thibault v. Woodward Governor Co., No. 058982, 1992 Conn. Super. LEXIS 1742 (Conn. Super. Ct. 1992)
Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988).
Unified Sch. Dist. v. Labor and Ind. Rev. Comm., 476 N.W.2d 707 (Wis. Ct. App. 1991).
Valdes v. Lumbermen's Mut. Casualty Co., 507 F. Supp. 10 (S.D. Fla. 1980).
Williams v. Hampton, 7 Empl. Prac. Dec. P9226 (N.D. Ill. 1974).
Yoder v. Yoder, 204 Ct. Cl. 931 (1974).
Zaks v. American Broadcast Co. Inc., 626 F. Supp. 695 (C.D. Cal. 1985)
Zalewski v. M.A.R.S. Enter. Ltd., 561 F. Supp. 601 (D. Del. 1982).

This summary was prepared by Stephen J. Curran, Georgetown University Law Center

APPENDIX II

Local & State Action to Provide Protections Against Discrimination Based on Sexual Orientation

Comprehensive State Laws

California
Connecticut
Hawaii
Massachusetts
Minnesota
New Jersey
Vermont
Wisconsin

State Executive Orders (public employment)

Colorado
Louisiana
Maryland
Michigan
New Mexico
New York
Ohio
Oregon
Pennsylvania
Rhode Island
Washington

Cities/Counties with Ordinances or Public Employment

Alaska
- Anchorage

Arizona
- Phoenix
- Tuscon

California
- Berkeley
- Cathedral City
- Cupertino
- Davis
- Hayward
- Huntington Beach
- Laguna Beach
- Long Beach
- Los Angeles
- Mountain View
- Oakland
- Riverside
- Sacramento
- San Diego
- San Francisco
- San Jose
- San Mateo County
- Santa Barbara
- Santa Cruz
- Santa Monica
- West Hollywood

Colorado
- Aspen
- Boulder
- Boulder County
- Crested Butte
- Denver
- Morgan County
- Telluride

Connecticut
- Hartford
- New Haven
- Stamford

District of Colombia

Florida
- Alachua County
- Hillsborough County
- Key West
- Miami Beach
- Palm Beach County
- Tampa
- West Palm Beach

Georgia
- Atlanta
- Fulton County

Hawaii
- Honolulu

Illinois
- Champaign
- Chicago
- Cook County
- Evanston
- Urbana

Indiana
- Bloomington
- Lafayette

Iowa
- Ames
- Iowa City

Louisianna
- New Orleans

Maine
- Lewiston
- Portland

Maryland
- Baltimore
- Gaithersberg
- Howard County
- Montgomery County
- Prince George's County
- Rockville City
- Takoma

Massachusetts
- Amherst
- Boston
- Cambridge
- Malden
- Somerville
- Worcester

Michigan
- Ann Arbor
- Detroit
- East Lansing
- Flint

New Mexico
- Albuquerque

New York
- Albany
- Alfred
- Brighton
- Buffalo
- East Hampton
- Ithica
- New York City
- Rochester
- Suffolk County
- Syracuse
- Tompkins County
- Troy
- Watertown

North Carolina
- Carrboro
- Chapel Hill
- Durham
- Orange County
- Raleigh

Ohio
- Cincinnati
- Cleveland
- Columbus
- Cuyahoga County
- Dayton
- Yellow Springs

Oregon
- Ashland
- Corvallis
- Eugene
- Portland

Pennsylvania
- Harrisburg
- Lancaster
- North Hampton
- Philadelphia
- Pittsburgh
- State College
- York

South Carolina
- Columbia

South Dakota
- Minnehaha County

Texas
- Austin

Utah
- Salt Lake County

Vermont
- Burlington

Virginia
- Alexandna County

Washington
- Clallam County
- Clark County
- King County
- Olympia
- Pullman
- Seattle
- Vancouver

West Virginia
- Morgantown

Wisconsin
- Dane County
- Madison
- Milwaukee

Part A

COMPLAINTS OF DISCRIMINATION BASED ON SEXUAL ORIENTATION

WISCONSIN

	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	TOTAL
All Discrimination Cases*	41	45	41	74	62	81	99	71	108	111	104	847

*Wisconsin prohibits discrimination based on sexual orientation in housing, public accommodations, education, and employment. Approximately 90% of discrimination cases are in employment.

MASSACHUSETTS

	1990	1991	1992	1993	TOTAL
All Discrimination Cases*	44	82	73	132	331
Employment Discrimination Cases	34	72	60	90	256

*Massachusetts prohibits discrimination based on sexual orientation in housing, credit, public accommodations, and employment.

Fiscal Year July 1st - June 30th.

HAWAII

	1990-1991	1991-1992	1992-1993	1993-1994	TOTAL
All Discrimination Cases	1	13	6	11	31
Employment Discrimination Cases	1	13	6	11	31

*Hawaii prohibits discrimination based on sexual orientation in housing, public accommodations, access to services receiving state financial assistance, and employment

CALIFORNIA

	1991-1992	1992-1993	1993-1994	TOTAL
Employment Discrimination Cases*	N/A	N/A	N/A	N/A

*California only prohibits discrimination based on sexual orientation in employment

Fiscal Year July 1st - June 30th.

CONNECTICUT

	1991-1992	1992-1993	1993-1994	TOTAL
All Discrimination Cases*	21	32	34	77
Employment Discrimination Cases	19	31	N/A	50

*Connecticut prohibits discrimination based on sexual orientation in housing, public accommodations, credit, state practices, services of the state, licensing, state educational and vocational programs, allocations of benefits, and employment

NEW JERSEY

	1991-1992	1992-1993	1993-1994	TOTAL
All Discrimination Cases*	18	29	25	72
Employment Discrimination Cases	N/A	N/A	N/A	25

*New Jersey prohibits discrimination based on sexual orientation in public housing, public accommodations, real estate transactions, and employment

Fiscal Year July 1st - June 30th.

MINNESOTA

	1993-1994	1994-1995	TOTAL
All Discrimination Cases*	14	N/A	14
Employment Discrimination Cases	10	N/A	10

*Minnesota prohibits discrimination based on sexual orientation in housing, public accommodations, public services, education, and employment

VERMONT

	1992-1993	1993-1994	TOTAL
All Discrimination Cases*	9	14**	23**
Employment Discrimination Cases	2	7 - state employment 4 - private emp. 1993 3 - private emp. 1994 14	16

*Vermont prohibits discrimination based on sexual orientation in housing, public accommodations, and employment
**Sexual orientation based discrimination in housing and public accommodations for 1994 are not available at this date

Fiscal Year July 1st - June 30th.

Data complied by: Rhonda M. Bethea, Georgetown University Law Center and John King, American Civil Liberties Union

APPENDIX III

ALABAMA

To earn graduate-school tuition, John Howard gave tours of Gulf States Paper Company's large private art collection. Another employee told Howard's supervisor about Howard's sexual orientation. The supervisor called Howard in, acknowledged that his work was "perfect," and asked him whether he was gay and whether he belonged to any gay organizations. After learning that Howard was president of the University of Alabama Gay and Lesbian Alliance, the supervisor fired him.

ARIZONA

Jeffrey Blain worked in sales for Golden Sate Container, a Phoenix area manufacturer. During his first six months, Blain received a 37.5 percent raise. In recognition of his early success, Golden State transferred Blain to a new division of the company to assist in sales. But the manager of the new division expressed hostility toward Blain and encouraged speculation about Blain's sexual orientation. Blain complained to Golden State's vice-president. Soon afterwards, the vice-president fired Blain, explaining only that Blain was "a fish out of water."

CALIFORNIA

William Ballou began working as a waiter at a Marie Callendars restaurant in Fremont. Within six-months, he had received both a promotion to assistant manager and a glowing letter from the franchise owners. One day Ballou noticed a violation of company policy and reported it to the manager. But the manager responded angrily, shouting anti-gay slurs at Ballou. Ballou informed the restaurant owners of the confrontation, but instead of enforcing the company policy they fired Ballou, citing "personality conflicts." The owners refused to elaborate.

Xavier David Caylon waited tables at a San Diego franchise of a national restaurant chain. After about a year, he applied to enter management. The district manager -- who admitted privately that she had a "problem" with gay men -- rejected Caylon's application, and Caylon left for another state. A year later, Caylon returned to San Diego, to another franchise in the same restaurant chain. At this location, Caylon suffered repeated harassment. Cooks and busboys would heat his plates, lose his checks and use derogatory nicknames. After more than two years of harassment, and with his path to promotion blocked by prejudice, Caylon quit.

FLORIDA

Carolyn O'Neill is a heterosexual, single mother of three young children. She relied on her job at a Tampa bar to support herself and her children. In late 1993, the bar's owners decided to target a gay clientele and to hire new waitstaff consisting of only gay men. They fired all their heterosexual employees, including O'Neill. After these firings gained publicity, many of Tampa's gay and lesbian citizens mounted a boycott of the bar to protest the discrimination O'Neill and others had suffered. The bar, with its business undermined, shut down shortly thereafter. As a boycott leader observed, "Sexual orientation has no bearing on your capacity to mix drinks. Discrimination is wrong whether it's directed against gays and lesbians or straights."

GEORGIA

Terry Stowe began work in 1982 as a part-time sales representative for a national clothing retailer. By 1991, Stowe had worked his way up to the position of manager, having received several commendations, raises and large bonuses along the way. Yet speculations about his sexual orientation made him the target of pressure within the clothing chain's administration. The regional vice-president would call gay employees "flits" and often press Stowe to call women employees for dates. Eventually the regional vice-president realized Stowe was gay and began excluding him from regional manager meetings and dinners. In December 1991, the regional VP told Stowe that he was not going any further with the company and that it would be best if he resigned. The vice-president refused to give Stowe any further explanation. Stowe's job ended in January 1992.

In 1991, Meredith Daley -- who is heterosexual - and southeast regional recruiting manager for the same national clothing retailer, received instructions not to forward for management positions, the names of any employees who even appeared to be lesbian or gay.

Dean Hall of Augusta took a job as a salesperson at a local car dealership. Hall's manager regularly saw Hall dropped off and picked up from work by his male partner. Hall had been at the job for only three weeks and had just sold his first big sale when he was fired. Asked why, the general manager told Hall that "it's not any of your damn business and I don't have to tell you anything."

KANSAS

Vernon Jantz is heterosexual, married and the father of two children. In 1987 and 1988, Jantz often substituted throughout the Wichita school district, including in the Wichita North High School social studies department. When Wichita North announced an opening for a social studies teacher, Jantz received sterling recommendations from fellow teachers, including the director of the social studies department. But the principal's secretary remarked that Jantz reminded her of her ex-husband, who she thought was gay. As a result, the principal hired someone else. When the department director asked the principal why he had not hired Jantz, the principal explained that he had rejected Jantz because of his "homosexual tendencies." Jantz sued the school in federal court. But because federal law does not protect against discrimination based on sexual orientation, Jantz lost his case.

MARYLAND

For many years, Mike Engler, a stockbroker, participated actively in the civic life of Cumberland, serving on the board of the local Red Cross, the local college's development committee, and the local country club's planning committee. In 1985, a local financial services company hired Engler away from another firm to start a brokerage division. Under Engler's leadership, the new division became highly profitable. But after Engler bought a home in Cumberland and moved in with his partner, the company fired him. The president and the board chair explained that Engler was not "compatible" with the company or the community, and that he could not "participate in things expected" of him. After the company fired Engler, it refused to give him a reference and made it extremely difficult for him to work as a stockbroker. He was forced to sell his house and spend much of his retirement savings; eventually he took a job as a bartender. After considerable struggle, Engler once again works as a stockbroker, marketing to the gays community.

MASSACHUSETTS

Karen Harbeck began teaching as an assistant professor at the University of Massachusetts at Lowell in 1986. When she was hired, the dean acknowledged her credentials and accomplishments, and promised to promote her within one year. But a student began threatening Harbeck's life, carrying a gun onto the campus and saying the God had "ordained" him to "kill all homosexuals." Soon afterwards, the university notified Harbeck that the school no longer needed her courses or her services and that it was terminating her contract. But the university never canceled Harbeck's courses. Instead, the school hired another professor, one with no background in human relations or minority issues, to teach the same courses.

MICHIGAN

When Steve Vanston interviewed for a job with Jon Anthony Florist in Lansing, Michigan, Anthony asked if Vanston's roommate, who was waiting to pick him up, was his "girlfriend." Vanston said yes and was hired as the store's sales manager. Soon after Vanston started work, the general manger told him "Thank God" he had a girlfriend, because "we all thought you were a fag."

Vanston set sales records and received positive reviews and raises the first several months of his work at the shop. The owner asked him to do bill collection after hours, for extra money. One day a friend of Vanston's died in a car accident, and many of Vanston's friends came to the store to buy flowers for the funeral. A co-worker was overheard saying, "We've noticed a lot of fags in here lately." Shortly thereafter, Vanston's supervisor removed him from sales and reduced his hours to part-time, causing the loss of his health insurance. When Vanston complained, his supervisor responded, "We can do whatever we want," and accused him of taking off too many days. When she then told Vanston he could not take long-promised time off to pick his mother up at the airport, Vanston quit.

MISSISSIPPI

Jessie Shaw worked as a social worker at Hudspeth Retardation Center, a state-funded center for retarded children near Jackson, Mississippi. Shaw had a good background

for the job, having a degree in psychology and experience caring for sick, abused and neglected children at the Children's Bureau in Los Angeles. But Shaw's partner missed her family, and they moved to Mississippi, where, as Shaw puts it, "your family is everything."

Nearly every day at work her co-workers shared pictures of their families. Shaw did not hide her sexual orientation, and one day a co-worker asked to see a picture of her partner. So she brought in photos of herself, her partner and their two dogs. Shaw showed the photos only to co-workers who asked to see them. But when Shaw was away from her desk, a co-worker looked in the album. Deciding she did not like what she saw, she complained to management about the photos. Ten days later, a supervisor called Shaw into his office. Even though he praised her work, saying she was "one of the best employees they had" -- he fired her, not because she was gay, "but because you brought in pictures of your lover."

Shaw now works in a temporary job as a long-distance operator. She misses social work, the work she feels she was meant to do.

NEW HAMPSHIRE

After a year working as a warehouse overseer in the Concord area, Ron Lambert had established an unequalled performance record. He had met and surpassed shipping quotas, reduced costs, and received regular praise, additional responsibilities, and unusually large raises and bonuses. Lambert had also established friendships with a few other managers at the warehouse and had met their spouses and families. Partly out of a sense of reciprocity, Lambert began to "come out" privately to these co-workers. Suddenly, without warning, the director of operations summoned Lambert into his office, announced that Lambert was "not the man for the job," gave him a final paycheck, and escorted him off the premises. The company gave Lambert no other explanation for his firing; a fellow manager corroborated Lambert's belief that the company fired him for being gay.

OHIO

Joyce Perciballi of Canton worked at DeBold, Inc., a Fortune 500 company, for over thirteen years. She started as a clerk and advanced to the position of manager. During that time, she received five quality awards from the company and 27 complimentary letters from customers, including one that said "there should be more Joyce Perciballis." While at DeBold, Perciballi had "come out" to a few co-workers. But during a meeting that Perciballi did not attend, her supervisor announced Perciballi's sexual orientation to the entire department. Early in 1994, three of Perciballi's superiors summoned her into an office where they interrogated her for an hour about her sexual relationships. Two days later came another interrogation, this time for three hours, followed by two lengthy telephone calls to her home. The next week she was fired. A lawyer told her "it's a sad story, but it's not against the law." Perciballi obtained a settlement from the company based on invasion of privacy, and has been collecting unemployment compensation.

VIRGINIA

Jennifer Lynch worked in Arlington as a live-in aid at a residential facility for mentally retarded adults. As the live-in aide, Lynch supervised the residents, distributed prescription, and ran educational programs. From the beginning, Lynch was open about her sexual orientation, which caused no trouble. Indeed, both performance reviews she received rated her work as excellent. Then the facility hired a new supervisor. The new supervisor announced a policy for visits by friends of live-in aides, requiring that, except in an emergency, live-in aides get his permission in advance to have guests.

Soon thereafter Lynch's partner, Heidi, came out to her parents and was thrown out of the house. She had no money and nowhere to go. When Heidi went to retrieve some of her personal possessions, she was physically assaulted, leaving her bruised and bleeding. She called Lynch for help, and Lynch immediately notified her supervisor that she had an emergency and that her friend would be visiting for the night. Before they reached the facility, Heidi's mother called and spoke to Lynch's supervisor. Later that evening, the company vice-president called to insist that Heidi could not stay there. The next day, Lynch was suspended. The following week, Lynch was fired. Her supervisor gave as his principal reason "evidence of insubordination," which he refused to explain further.

WASHINGTON

Bonita Corliss of Seattle was recruited by a state agency in 1987 for a position in the library at the state women's prison. Soon afterward, anti-gay harassment started. One day, arriving for work, she discovered that someone had taken all the gay and lesbian titles off the shelves and stacked them on her desk. Later, the deputy superintendent called her into the superintendent's office and demanded to know her sexual orientation. Corliss also faced anti-gay harassment from a gang of inmates who openly identified with the Ku Klux Klan. Although she sought help from her supervisors, they left her to fend for herself. Finally, prison officials gave Corliss a letter stating that she had become "a threat to the security of the institution." Eleven weeks after Corliss began her job, a prison administrator met her, ordered her to surrender her identification, escorted her to pack her personal possessions, and rushed her off the premises.

Over years of reporting on education issues at the Tacoma Morning News Tribune, Sandy Nelson received several journalistic awards, positive reviews, and pay raises. In 1986, however, another company purchased the newspaper and abrogated union contracts, including a clause that protected employees from retribution based on off-duty activities.

In 1989 Tacoma enacted an anti-discrimination ordinance. Immediately a local group launched a campaign to overturn the ordinance and re-legalize discrimination on the basis of sexual-orientation. As a citizen, Nelson worked during her off-hours to retain the ordinance. After company managers learned of Nelson's involvement in the campaign, they reprimanded her and transferred her to the night copy desk. However, the company neither reprimanded nor interfered with other reporters who were politically active in other causes off the job. Indeed, even when Nelson herself worked on other causes -- opposing the Gulf War and supporting abortion rights -- the newspaper did not intervene.

On her own time, in 1994, Nelson testified in favor of a state anti-discrimination bill. Once again, the newspaper reprimanded her, this time threatening her with further unspecified "administrative action."

Rivendell Marketing Company, Inc.
P O Box 1268 | Plainfield, NJ 07061-1268 | 908-754-4348 | FAX 908-769-1375

DATE: July 28, 1994

TO: Scott Foster
FROM: Michael Gravois

RE: Simmons Market Research Bureau survey of readers of gay publications

---

NUMBER OF PAGES INCLUDING COVER SHEET: 4

As per your request, please find information compiled by the Simmons Market Research Bureau on the readers of the National Gay Newspaper Guild. The Guild is a network of gay publications from major U.S. markets which include New York City, Los Angeles, Chicago, Houston, Philadelphia, Boston, San Francisco, Washington DC, Dallas and Miami. A survey was conducted in 1988 and 1992. For the record, the participants in the 1988 survey were publications from New York, Chicago, Houston, Philadelphia, Boston, San Francisco, Washington DC and Dallas. Participants in the 1992 survey included every member except the publication from Chicago. The statistics that you'd quoted to me on the phone ($36,800 vs. $12,287) were taken from the 1988 survey (see pages 3 & 4). Page two contains information from the more recent 1992 Simmons survey.

The information gathered by the Simmons organization was never intended (and never claimed) to represent the gay and lesbian community at large, but only the readers of the individual member publications. Just as a survey of the readers of *Newsweek*, *Forbes*, or *Redbook* are not representative of all Americans, the Simmons survey does not represent all members of the gay and lesbian community. *The demographics were collected solely as*

a tool in order to pursuade potential advertisers to advertise in their publications.

Who is the typical Guild reader? He is basically a white male, with the median age of 36, employed (92.1% are employed), with a college degree (59.6% have graduated a 4 year college or more), who lives in a city (71.8% live in urban areas), with an HHI of $63,700, and an average individual income of $41,300. You will see that women and people of color are out of the picture. It's not by any oversight on the part of Simmons, it just doesn't reflect the readership of these publications. If the opposition wants to use this information against the gay community, then they have to realize that they are not including the whole picture, but only a segment of the total market.

As you are probably aware, the amount of one's income does not prohibit that individual from experiencing discrimination. The amount of one's salary protects them from nothing. Whether one makes $20,000, $41,000 or $100,000, that individual in most places in the United States can still be fired for being gay, denied job advances for being gay or be thrown out of his or her apartment for being gay. Case in point, I could be an officer in the United States Armed forces making $41,300 and be discharged for being gay. My salary base proves nothing. Discrimination is discrimination regardless of your income.

I hope that the information that I have provided and my explanation of its intent is helpful to you. If I can be of additional service, please do not hesitate to call me at (908) 754-4348.

15 YEARS
GAY & LESBIAN MARKETING SPECIALISTS

1992 survey

NGG

National Gay Newspaper Guild

Bay Area Reporter
Bay Windows
Dallas Voice
Frontiers
The Houston Voice
New York Native
Philadelphia Gay News
Washington Blade
The Weekly News
Windy City Times

Profile of the National Gay Newspaper Guild*

The National Gay Newspaper Guild (NGNG) is a network of gay publications from across the country which includes: *Bay Area Reporter* (San Francisco), *Bay Windows* (Boston), *Dallas Voice, Frontiers* (LA), *The New Voice* (Houston), *New York Native, Philadelphia Gay News, The Washington Blade* (DC), *The Weekly News* (Miami), and *Windy City Times* (Chicago).

Who is the National Gay Newspaper Reader?

Gender:	89.9% Male, 10.1% Female
Age:	18 - 34 46.1% 35 - 44 32.6% 45 - 54 14.6%
Education:	59.6% graduated 4 year college or more
Employment:	92.1% are employed 50.6% are professional/managenal 12.7% are employed in top management
Income:	$41,300 - Average individual income 53.9% have individual incomes over $30M 21.7% have individual incomes over $50M $63,700 - Average household income 79.2% have household incomes over $30M 41.8% have household incomes over $60M

National Gay Newspaper Guild readership statistics:

Number of last 6 issues read or looked at	5.1 (mean)
Total amount of time spent with last issue	58.2 minutes
Total readers per copy	2.6
Combined NGNG circulations	212,000
Combined NGNG readerships	551,200

Impact advertisements have on NGNG readers:

Likely to use a product or service advertised	91.8%
Likely to purchase products or services of national businesses advertised	88.3%
Likilihood of mentioning to others products/ services advertised in publication	49.8%

Rivendell Marketing Company | P.O. Box 1268 | Plainfield, NJ 07061-1268 | 908-754-4348 | Fax: 908-769-1375

1988 Survey

DEMOGRAPHICS

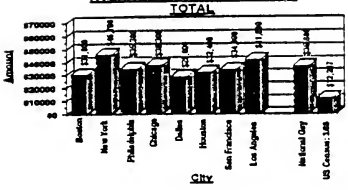
The Simmons survey verifies that the gay consumer has a very high income level, a very high education level, usually no dependents, and therefore a very high amount of discretionary income. The average individual income for the readers of the eight top gay newspapers is $36,800 (over three times the national average), and the average household income is $55,430 (over 1.7 times the national average). Almost 60% of the readers are college graduates (over 3.3 times the national average), with 35% having done postgraduate work. Our readers are 97% employed with 49% holding professional or managerial positions (over three times the national average). They are 86% male and their average age is 36, with 74% between 25 and 44 years of age.

1988 survey

INDIVIDUAL INCOME

SIMMONS SURVEY – EIGHT TOP GAY PAPERS

AVERAGE INDIVIDUAL INCOME: TOTAL

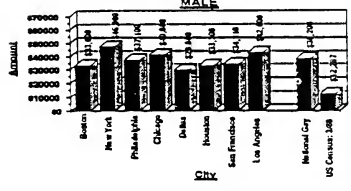


The survey shows that the average individual income of our readers is $36,800 compared to the national average individual income figure for 1988 provided by the US Census Bureau of $12,287. Census figure is from a report entitled "Money, Income and Poverty Status in US – 1987."

When our average individual income is expressed as a percentage of the national Census Bureau figure, our readers are shown to earn at a rate of 299.5% of the national average individual income.

AVERAGE INDIVIDUAL INCOME: TOTAL – INDEX

AVERAGE INDIVIDUAL INCOME: MALE



The survey shows that the average individual income of our adult male readers is $38,200 compared to the national average individual income figure for 1988 provided by the US Census Bureau of $12,287. The Census Bureau report gives no break-down by sex, so their total population figure is used here for calculations.

When our average individual income for adult males is expressed as a percentage of the national Census Bureau figure, our adult male readers are shown to earn at a rate of 310.9% of the national average individual income.

AVERAGE INDIVIDUAL INCOME: MALE – INDEX

HILL AND KNOWLTON

Hill and Knowlton, Inc.
International Public Relations Counsel
420 Lexington Avenue
New York, New York 10017
212 597-5600

News Release

FOR RELEASE:
June 9, 1994

CONTACTS:
Amy Menken
Hill and Knowlton
(212) 697-5600

Watts Wacker/
Rex Briggs
Yankelovich Partners Inc.
(203) 227-2700

BREAKTHROUGH YANKELOVICH STUDY PROVIDES NEW INSIGHTS ON MARKETING TO GAY AND LESBIAN POPULATION

WESTPORT, CONN., June 9, 1994 -- Yankelovich Partners Inc., the leading market research firm, today released important findings on the gay and lesbian population that should significantly affect how marketers and advertisers address this group in the future. The data is an offshoot of the Yankelovich Monitor®, the firm's ongoing research effort that has collected and interpreted a broad range of consumer data annually since 1971. Yankelovich has compiled this information to produce the first Yankelovich Monitor: Gay/Lesbian Report. Yankelovich has also provided the data to author/business consultant Grant Lukenbill, whose upcoming book, *Untold Millions: The Gay and Lesbian Consumer Revolution in America*, integrates the research. The book will be published by HarperCollins.

The research profiles the attitudes, values, perceptions and demographics of gay and lesbian Americans. Watts Wacker, resident futurist and managing partner at Yankelovich, comments, "This research represents one of the first nationally representative portraits of self-identified gay and lesbian Americans. We believe it has important ramifications for businesses that currently market or plan to market to this segment of the population."

A core finding is that gay and lesbian Americans are increasingly looking for products marketed by companies that address and serve their needs. "The study validates that there is a real need and a tremendous opportunity for companies to market directly to the gay and lesbian population, as some have begun to do," says Rex Briggs, project director for the Yankelovich Monitor: Gay/Lesbian Report. "The key to building strong relationships with gay and lesbian Americans is to learn about them as

consumers, understand and fulfill their marketplace needs and effectively communicate to them."

Additional findings include:

Demographics

- Approximately 6 percent of the U.S. population *identify themselves* as gay/lesbian. The distribution of this group mirrors that of the heterosexual population with regard to gender, ethnicity and age.
- Gay/lesbian Americans are twice as likely as heterosexuals to have attended graduate school (14 percent of the gay/lesbian population compared to 7 percent of heterosexuals).
- Personal income of gay/lesbian Americans is roughly equivalent to that of heterosexuals.
- Eighteen percent of gay/lesbian Americans are self-employed, compared with 11 percent of heterosexuals.
- Political affiliations of the gay/lesbian population mirror those of the heterosexual population. However, a higher proportion of the gay/lesbian population (28 percent compared with 17 percent of heterosexuals) holds a liberal point of view.
- The gay/lesbian population has fewer Protestants compared with the heterosexual population (46 percent compared with 56 percent). Other religious affiliations are represented in similar proportion in the gay/lesbian population as in the heterosexual population.
- Forty-two percent of gay/lesbian Americans indicate that they consider themselves married, compared with 54 percent of heterosexuals.
- Lesbians are nearly as likely as heterosexual women to have children. Fifty percent of the gay/lesbian population are parents (compared with 66 percent of heterosexuals); 25 percent have children under 18 in the household (compared with 32 percent of heterosexuals).
- The gay/lesbian population is more highly concentrated in the 25 most populated metropolitan counties (56 percent of gay/lesbian Americans live in the top 25 counties compared with 38 percent of heterosexuals); they are underrepresented in the South (25 percent compared with 35 percent

of heterosexuals) and overrepresented in the North Central census region (32 percent compared with 23 percent of heterosexuals).

Social Issues

- The heterosexual population's unaccepting attitudes toward the gay/lesbian population have decreased significantly over the last 10 years.
- Gay/lesbian Americans feel much higher levels of stress regarding financial security, employment, personal life and parents than do heterosexuals.

The Yankelovich gay/lesbian sample was defined through a confidentially disclosed, self-identified item within the 1993 Monitor questionnaire. Respondents were asked to review a list of 53 self-descriptors and choose those terms that best described or represented them. One of the self-describing terms was "gay/homosexual/lesbian." Their responses to the full survey were compiled as the Yankelovich Monitor: Gay/Lesbian Report.

Lukenbill notes, "The Yankelovich findings are not only the first of their kind, but they confirm that numerous presumptions and stereotypes about gay and lesbian Americans are incorrect, particularly those regarding individual values, income, education and political affiliations." Lukenbill's book will explore the ramifications of the data in greater detail.

Yankelovich Partners, headquartered in Westport, Conn., maintains a network of offices and associates that provide research capabilities in more than 80 countries.

Appendix

Demographic Profile

	1993 Yankelovich MONITOR	
	Gay/Lesbian	Heterosexual
Personal income	%	%
Under $25K	85	78
$25-$49,999	12	19
$50-$99,999	2	3
$100K+	1	*
Household income:		
Under $25K	44	38
$25-$49,999	39	39
$50-$99,999	14	20
$100K+	3	3
Mean personal income (000)	$16.9	$17.6
Mean household income (000)	$35.8	$36.7

	1993 Yankelovich MONITOR			
	Gay Male (63)	Heterosexual Male (1145)	Lesbian (80)	Heterosexual Female (1215)
	%	%	%	%
Personal income:				
Under $25K	81	65	87	88
$25-$49,999	33	29	11	11
$50-$99,999	3	5	1	1
$100K+	3	1	*	*
Household income:				
Under $25K	37	32	47	43
$25-$49,999	49	42	33	37
$50-$99,999	9	23	18	17
$100K+	5	3	2	3
Mean personal income (000)	$21.5	$22.5	$13.3	$13.2
Mean household income (000)	$37.4	$39.3	$34.8	$34.4
Mean household size	3.03	3.05	2.78	2.97

STATEMENT OF

CHAI R. FELDBLUM

Mr. Chairman and members of the Committee, my name is Chai Feldblum. I am an Associate Professor of Law at Georgetown University Law Center, where I direct a Federal Legislation Clinic and teach Federal Legislation, Disability Law, and Sexual Orientation and the Law.

I am pleased to testify here today on behalf of the Leadership Conference on Civil Rights, the nation's oldest, largest, and most broadly-based coalition. For forty-four years, the Leadership Conference has been the legislative arm of the civil rights movement. As part of my work with the Leadership Conference, and as a consultant to the Human Rights Campaign Fund, I have worked on the issue of employment discrimination on the basis of sexual orientation, and specifically on the Employment Non-Discrimination Act of 1994.

My testimony covers four areas:

- The lack of existing protection for gay men, lesbians, bisexuals, and heterosexuals who experience discrimination in employment based on their sexual orientation;
- The need to outlaw employment discrimination based on sexual orientation;
- The experiences of six of the eight states that have passed anti-discrimination protection in employment based on sexual orientation; and
- A description of what S. 2238 requires, and does not require, in the area of employment non-discrimination.

I. LACK OF EXISTING PROTECTION

A majority of the American people believe gay men and lesbians currently enjoy protection

against arbitrary discrimination in the workplace. This misperception should not surprise us. American people have a gut sense that essential American values of fairness and equality should prevail in our society and that, indeed the federal Constitution or "some federal law" protects Americans from unfair and arbitrary discrimination in the workplace.

Unfortunately, this is not the case. As civil rights attorneys across this country know, the federal Constitution prohibits discrimination **only** when practiced by a governmental body or by an entity significantly intertwined with a governmental body.[3] Thus, even if gay people were successful in gaining protection through the provisions of the federal Constitution, such protection would still not provide legal recourse to the majority of people who work for private employers. Thus, gay people need what other minorities and women have: protection under the federal Constitution and protection under a federal statute.

Individuals who experience discrimination in private employment because of their race, religion, national origin, gender, age, or disability are covered under various federal anti-discrimination laws.[4] The first of such laws, Title VII of the Civil Rights Act of 1964, prohibits employment discrimination on the basis of -- among other characteristics -- sex. In a few cases, gay people have attempted to receive protection under Title VII by arguing that discrimination on the basis of sexual orientation should be included under the rubric of sex discrimination.

---

[2] According to a 1994 Mellman, Lazarus & Lake poll, 70% of the American public are unaware that federal civil rights laws do not prohibit firing a person solely on the basis of his or her sexual orientation.

[3] To bring a constitutional challenge against an employment decision made by a non-governmental employer, an individual must show: 1) that the state compelled the employer to act as it did, or; 2) that the employer provided a public function that the state was obligated to provide, or; 3) that the relationship between the state and the employer is so close that it is fair to treat the two as one entity. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

[4] Appendix I, pp. 1-9, includes a summary of cases which have raised constitutional challenges and the reasoning used to reject or accept the constitutional claim. This summary excludes cases challenging the military ban.

[5] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The Age Discrimination in Employment Act of 1967 prohibits employment discrimination on the basis of age. The Americans with Disabilities Act of 1990 prohibits employment discrimination on the basis of disability. Other federal laws also prohibit employment discrimination on the part of entities that receive federal funds. Title VI of the Civil Rights Act of 1964 prohibits such discrimination in limited circumstances on the basis of race, color, and religion; section 504 of the Rehabilitation Act of 1973 prohibits such discrimination on the basis of disability; and the Age Discrimination Act of 1975 prohibits such discrimination on the basis of age; and Title IV of the Education Amendments of 1972 prohibits sex discrimination in education.

The judicial response to such challenges has not been positive. For example, the court that ruled against Ernest Dillon, who brought such a sexual orientation discrimination claim under Title VII, had this to say: "[Dillon's coworkers' actions] were all directed at demeaning him solely because they disapproved of his alleged homosexuality. These actions, although cruel, are not made illegal by Title VII."[1]

Thus, with few exceptions, gay people who experience discrimination in employment have no constitutional protection and no federal statutory protection. Some gay people who have experienced egregious forms of discrimination have pursued tort remedies, and some have pursued implied-contract remedies. As a general matter, such claims have not been successful.[2]

II. THE NEED TO OUTLAW EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

There is a long tradition in this country, embodied in the "employment-at-will" doctrine, which allows private employers to fire, hire, and make other employment decisions as they wish.[3] While the labor movement in this country has made critical strides in negotiating contractual protections for its members, most private employers' prerogatives are constricted only in limited circumstances: if they voluntarily choose to bind themselves by contract; in some states, if their actions are found by a court to be contrary to public policy;[4] or if the state or federal government chooses to intervene through passage of anti-discrimination legislation.

---

[1] *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992). Cases in which a Title VII claim was unsuccessfully raised to challenge sexual orientation employment discrimination are summarized in Appendix I, pp. 10-13.

[2] Appendix I, pp. 17-18, summarizes five cases brought under contract or tort theories, two of which were successful.

[3] In some states, courts have created an exception to the "employment-at-will" doctrine by refusing to uphold discharges that are contrary to the state's public policy. For example, an employee who is discharged in retaliation for "whistle-blowing," in a state that has a policy encouraging whistle-blowing, may successfully argue the discharge was illegal because it contravened the state's public policy.

The public policy exception, however, requires a pre-existing expression of the state's policy, usually embodied in a state statute or regulation. This exception has never been successfully invoked in the area of sexual orientation, probably because if there were a state law prohibiting sexual orientation employment discrimination (which would embody the state's policy), an individual would sue directly under that law. *See*, Appendix I, p. 17 (rejecting public policy contract claim).

Historically, state or federal governments have passed anti-discrimination legislation where there is a demonstrated problem of discrimination against a recognized group of people. Compelling evidence of such discrimination, on bases such as race and gender, was evident in 1964 when Title VII of the Civil Rights Act of 1964 was passed. Compelling evidence of such discrimination, on the basis of age, was evident in 1967 when the Age Discrimination in Employment Act was passed. Compelling evidence of such discrimination, on the basis of disability, was evident in 1990 when the Americans with Disabilities Act was passed.

Compelling evidence of such discrimination, on the basis of sexual orientation, is evident today. The three appendices to this testimony document such cases of discrimination. Appendix I summarizes over fifty cases alleging employment discrimination that have reached federal and state courts over the years, and that have resulted in judicial opinions. Appendix II, Part A, catalogs the number of complaints filed in seven of the eight states that have anti-discrimination laws -- over 800 complaints over the course of five years. The vast majority of these complaints deal with employment. Part B reproduces quotes from attorney participants in the Los Angeles County Bar Association Report on Sexual Orientation Bias which illustrate the overt discrimination gay men and lesbians face in the labor market. Appendix III summarizes 23 personal cases of discrimination documented by the Human Rights Campaign Fund. The Committee has heard today from two people who have personally experienced discrimination on the basis of sexual orientation, Cheryl Summerville and Ernest Dillon.

There is abundant evidence of employment discrimination against gay men, lesbians, and bisexuals across this country. Evidence of such discrimination justifies passage of the Employment Non-Discrimination Act of 1994.

III. STATE EXPERIENCES

The United States Congress would not be breaking new ground with passage of S. 2238. Eight states and the District of Columbia already have laws that prohibit employment discrimination on the basis of sexual orientation. These states are Wisconsin, which enacted the first law in

1982, followed by Massachusetts in 1989; Connecticut and Hawaii in 1991; California, D.C., New Jersey, and Vermont in 1992; and Minnesota in 1993.[1]

Appendix II indicates the number of sexual orientation discrimination complaints filed since enactment of these state laws for six of the eight states. In four of the states, the cumulative number of sexual orientation complaints and a breakdown of the number of employment discrimination complaints are noted. In the remaining two states, the number of employment complaints are noted. As a general matter, the area of employment represents the vast majority of the claims of discrimination based on sexual orientation.

Here are some examples of those statistics. In Massachusetts, which enacted a sexual orientation non-discrimination law in 1989, over 330 complaints have been filed with the Massachusetts Commission Against Discrimination (MCAD). Of these complaints, 256 allege discrimination in employment. None of these complaints have gone to court. They have either been resolved or dismissed.

In New Jersey, which enacted its law in 1982, 18 complaints charging discrimination on the basis of sexual orientation were filed for all covered areas in 1991-1992; 29 such complaints were filed in 1992-1993; and 25 such complaints were filed in 1993-1994. Of these 72 complaints, 25 dealt with alleged discrimination in employment. A majority of these cases have either been settled or dismissed. None has yet reached court.

Connecticut reflects similar numbers. In 1991-1992, there were 19 complaints filed charging employment discrimination on the basis of sexual orientation. In 1992-1993, there were 31 such employment complaints.

Minnesota passed its law quite recently; the law became effective on August 1, 1993. Since that time, 14 complaints of sexual orientation discrimination have been filed with the

[1] All eight states and the District of Columbia prohibit sexual orientation discrimination in employment, and all but California extend this protection to housing and public accommodations. Minnesota and Wisconsin also outlaw sexual orientation discrimination in public and private education.

Minnesota Department of Human Rights. Ten of the complaints concern employment and are currently being processed.[5]

IV. S. 2238: THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

S. 2238, the Employment Non-Discrimination Act of 1994 represents a reasoned and balanced approach to remedying employment discrimination on the basis of sexual orientation.

The core of S. 2238 is found in Section 3. That section states:

> A covered entity, in connection with employment or employment opportunities, shall not --
>
> (1) subject an individual to different standards or treatment on the basis of sexual orientation;
>
> (2) discriminate against an individual based on the sexual orientation of persons with whom such individual is believed to associate or to have associated; or
>
> (3) otherwise discriminate against an individual on the basis of sexual orientation.

The prohibition of S. 2238 is simple and straightforward. An employer may not use the fact of an individual's sexual orientation in making employment decisions. An employer may not treat an individual better or worse because that individual is a gay man, a lesbian, a bisexual, or a heterosexual. No better and no worse -- just the same.

S. 2238 does not deal with the issue of partner benefits. While employers are free to provide such benefits if they wish, S. 2238 does not create a right to such benefits.

S. 2238 also does not provide for a "disparate impact" claim. A disparate impact claim is a claim that a facially neutral practice of an employer has a disproportionately adverse effect on persons of a particular protected group.

A disparate impact claim under Title VII relies heavily on statistics. The plaintiff compares the percentage of individuals of a particular gender, race, or ethnicity in an employer's

---

[5] It is interesting to note that, of the ten complaints, five were brought by heterosexuals. In four of those cases, heterosexual men complained of being perceived as gay and harassed on that basis. In one complaint, a heterosexual woman complained of being subject to discrimination by a lesbian.

workforce with the percentage of such individuals in the pool of qualified applicants. If there is a significant disparity between the percentages, the plaintiff may argue that one or more of the employer's facially neutral employment practices causes the adverse effect on the hiring of such individuals. If the plaintiff makes out this case, the employer must then show the challenged employment practice is job-related and consistent with business necessity.

As you know, Congress codified the "disparate impact" claim under Title VII in the Civil Rights Act of 1991.

S. 2238 excludes disparate impact claims primarily because it is difficult to perform an accurate statistical analysis in the context of sexual orientation. Privacy concerns ordinarily foreclose an accurate statistical count of all gay men, lesbians, bisexuals, and heterosexuals in an employer's workforce and in the qualified applicant pool. While one could develop a count of the number of openly-gay people in a particular workforce, it would be difficult, if not impossible, to assess the number of openly-gay people in the relevant applicant pool.

Moreover, gay people do not usually face the type of discrimination that takes the form of disparate impact. Rather, the discrimination that occurs usually is either overt, intentional discrimination, or facially neutral actions that are pretexts for discrimination. Both of these types of actions are prohibited by S. 2238.

S. 2238 prohibits an employer from adopting a quota based on sexual orientation. The bill also prohibits an employer from giving preferential treatment to any individual based on the individual's sexual orientation. This is stricter than the rule which applies under Title VII. Under Title VII, an employer may voluntarily go beyond race or gender neutrality in certain circumstances, primarily to remedy past discrimination. Under S. 2238, while an employer may increase the diversity of its applicant pool by advertising and reaching out to members of the gay community, the employer may not give preferential treatment to an individual based on that individual's sexual orientation.

S. 2238 contains a broad religious exemption. The types of religious organizations that are exempted are derived from a similar exemption in Title VII. The scope of the exemption,

however, is significantly broader than the scope in Title VII. Title VII exempts religious organizations only with regard to discrimination based on religion; these organizations remain subject to Title VII's prohibition of discrimination on such grounds as race and gender. By contrast, except for profit-making activities, S. 2238 exempts religious organizations from the bill completely, thus exempting them from requirements based on sexual orientation.

S. 2238 does not apply to the relationship between the United States and members of the Armed Forces. Thus, the bill does not affect current law on gay men, lesbians, and bisexuals in the military.

S. 2238 adopts the enforcement mechanisms of Title VII, as amended by the Civil Rights Act of 1991. There is no desire to re-fight battles regarding enforcement in this bill. Rather, whatever enforcement mechanisms are granted to, and required of, other minorities and women under Title VII are the enforcement mechanisms that will be granted to, and required of, individuals who bring claims under this law. Thus, the requirement of filing claims with the Equal Employment Opportunity Commission (EEOC), the ability of an individual to bring a private right of action in court, and the ability of an individual to receive injunctive relief and damages, up to the limits authorized by Title VII, are all incorporated by reference in S. 2238.

Mr. Chairman and members of the Committee, it is time to pass the Employment Non-Discrimination Act of 1994.

I am attaching a statement from Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights.

I would be pleased to answer any questions.

Thank you. That concludes this morning's hearing.
[Whereupon, at 1:11 p.m., the committee was adjourned.]

O

82-696 (136)

ISBN 0-16-044874-3